This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

THE LIBRARY OF CONGRESS
1800
Class HE 2757
Book 1922
.A4

2

Modification of Transportation Act, 1920

120
20-18

HEARINGS

BEFORE THE

U.S. Congress. Senate.

COMMITTEE ON INTERSTATE COMMERCE
UNITED STATES SENATE

SIXTY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1150 and S. 2510

BILLS TO AMEND THE TRANSPORTATION ACT, 1920,
AND FOR OTHER PURPOSES

OCTOBER 24 TO NOVEMBER 2, 1921

PART 1

Printed for the use of the Committee on Interstate Commerce

WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

COMMITTEE ON INTERSTATE COMMERCE.

ALBERT B. CUMMINS, Iowa, *Chairman*.

CHARLES E. TOWNSEND, Michigan.
ROBERT M. LA FOLLETTE, Wisconsin.
MILES POINDEXTER, Washington.
GEORGE P. McLEAN, Connecticut.
JAMES E. WATSON, Indiana.
FRANK B. KELLOGG, Minnesota.
BERT M. FERNALD, Maine.
JOSEPH S. FRELINGHUYSEN, New Jersey.
DAVIS ELKINS, West Virginia.

ELLISON D. SMITH, South Carolina.
ATLEE POMERENE, Ohio.
HENRY L. MYERS, Montana.
OSCAR W. UNDERWOOD, Alabama.
A. OWSLEY STANLEY, Kentucky.
KEY PITTMAN, Nevada.

PAUL MOORE, *Clerk*.

LIBRARY OF CONGRESS
RECEIVED
NOV 10 1924
DOCUMENTS DIVISION

HE 2757
1922
.A4

MODIFICATION OF TRANSPORTATION ACT, 1920.

MONDAY, OCTOBER 24, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to the call, at 10 o'clock a. m., in room 410, Senate Office Building, Senator Albert B. Cummins presiding.

Present: Senators Cummins (chairman), Townsend, La Follette, Poindexter, Kellogg, and Pittman, and Senator Capper, author of Senate bill 1150.

The CHAIRMAN. The committee will come to order. The chairman desires to make a preliminary statement. It will be necessary, probably, for the members of the committee to be in their places on the Senate floor after 11 o'clock, and that is my reason for beginning promptly, even though but few members of the committee are here.

The committee is meeting to begin hearings upon Senate bill 1150, introduced by Senator Capper, of Kansas, together with all other bills that are now pending before the committee seeking to amend the transportation act of 1920.

The arrangement this morning is to hear, first, the National Association of Railway and Public Utilities Commissioners, and some one who represents that association will take charge of the presentation. Who represents the National Association of Railway and Public Utilities Commissioners primarily?

Mr. BENTON. Mr. Chairman, my name is John E. Benton. I am general solicitor of the National Association of Railway and Utilities Commissioners, and am located in Washington.

The CHAIRMAN. The reporter may put in the record bill S. 1150 at this point.

(The bill referred to by the chairman is here printed in full in the record, as follows:)

[S. 1150. Sixty-seventh Congress, first session.]

A BILL To amend the first paragraph of section 3 of the act to regulate commerce, as amended by section 405 of the transportation act, 1920; and to amend the first paragraph of section 15 of the act to regulate commerce, as amended by section 418 of the transportation act, 1920; and to repeal paragraphs 3 and 4 of section 13 of the act to regulate commerce, as amended by section 416 of the transportation act, 1920; and to repeal section 15a of the act to regulate commerce, as amended by section 422 of the transportation act, 1920, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 1 of section 3 of the act to regulate commerce, as amended by section 405 of the transportation act, 1920, be amended to read as follows:

"SEC. 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any State, through its proper regulatory bodies, from exercising full and complete jurisdiction for the regulation of intrastate traffic, which jurisdiction is hereby expressly reserved to the States."

THE LIBRARY OF CONGRESS
1800
Class HE 2757
Book 1922
.A4

I am certain that the chairman of your committee will remember that the present hearings were arranged for by the chairman of the committee on State and Federal legislation from Atlanta, for the purpose of presenting to your committee the views of members of the national association upon the subject of necessary amendments to the transportation act. If I may do so at the beginning of my statement I would like to present and have incorporated in the record the resolutions which were adopted by our convention?

The CHAIRMAN. That may be done.

Mr. BENTON. I think it is not necessary for me to read these resolutions if they may be incorporated in the record as if read.

The CHAIRMAN. That will be done.

(The resolutions referred to by the witness are here printed in full in the record, as follows:)

RESOLUTIONS ADOPTED BY THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS AT ITS ANNUAL CONVENTION, ATLANTA, GA., OCTOBER 11–14, 1921.

RESOLUTION RELATING TO AMENDMENT OF THE RATE-MAKING SECTIONS OF THE INTERSTATE COMMERCE ACT AS AMENDED BY THE TRANSPORTATION ACT.

Whereas the Interstate Commerce Commission, under authority claimed to have been conferred upon it by the transportation act of 1920, has made orders advancing railroad rates applicable to intrastate transportation in 24 States in disregard of State laws and orders of State commissions, and has instituted investigations upon the petition of carriers which are now in progress looking toward the advancing of railroad rates and express rates in several other States; and

Whereas section 15–a of the interstate commerce act as amended by the transportation act provides that the commission, under the group plan of rate making, contained in said section, shall fix an aggregate value of all lines within each rate group and shall make rates that will yield an aggregate fixed return on such aggregate value; and

Whereas under such group plan the worthless roads of the country, ill-considered ventures, duplicated lines, speculative enterprises, and roads that have served their useful purpose and outlived the industries which once justified their construction are valued with the good, and the good roads are given the right to earn upon their own value and also upon the value attributed to such worthless roads, which can not earn because they perform no sufficiently useful service in the actual movement of traffic to enable them to earn; and

Whereas the group plan, if carried out, will necessarily enable some carriers, in the exact words of said section 15–a, "to receive a net railway operating income substantially and unreasonably in excess of fair return upon the value of their railway property"; and

Whereas the Interstate Commerce Commission has attempted to make rates according to said group plan and has asserted the power under said plan to raise rates within one State to meet deficits in earnings incurred in other States; and

Whereas unjust and unreasonable rates have thereby been imposed upon the public; and

Whereas the people of the several States, under the interstate commerce act as amended, as interpreted and administered by the Interstate Commerce Commission, have been deprived of their accustomed powers of self-government: Therefore be it

Resolved, That we urge upon Congress immediate legislation at the present session which shall so amend the interstate commerce act as clearly to define and limit the power of the Interstate Commerce Commission, so that no intrastate rate may be changed or set aside without proof by competent evidence, and upon findings of fact made that the same is noncompensatory and injures a person or persons or a locality or localities engaged in interstate commerce to such an extent as seriously to diminish the business of such person or persons, or seriously to retard the growth and development of such locality or localities: Be it further

Resolved, That it is the sense of this association that the group plan of making rates, prescribed by said section 15a, is uneconomic and unsound and

that the attempt, under its provisions, to produce returns upon roads that are unable to earn returns themselves, has placed an unjust burden upon the business of the Nation, from which it should be relieved by the immediate repeal of said section 15a, and further

Resolved, That, as an aid in the construction of the interstate commerce act by the commission and the courts, Congress is requested to incorporate in such amendatory legislation a declaration of the purpose of Congress to recognize the right of the several States to exercise full and final jurisdiction over all rates for intrastate transportation which do not injure persons or localities engaged in interstate commerce in the manner aforesaid.

RESOLUTION RELATING TO ELECTRIC RAILROAD RATES.

Whereas in Omaha and Council Bluffs Street Railway Co. *v.* The Interstate Commerce Commission, 330 U. S. 324, arising out of an attempted exercise of jurisdiction over the interurban electric railroad between Omaha, Nebr., and Council Bluffs, Iowa, it was ruled by the Supreme Court that Congress had not granted to the Interstate Commerce Commission any such jurisdiction, and

Whereas in various cases which have since been before said commission, the commission has indicated an increasing disposition to disregard that decision and to assert and extend its authority over electric railroads that engage to any extent in interstate transportation, and

Whereas in William Wylie Beall *v.* Wheeling Traction Co., the commission has asserted that under the transportation act of 1920 it has, as to electric railroads, the same authority to prescribe intrastate fares that it has asserted in numerous steam railroad cases, and has exercised such claimed authority to advance franchise fares within the State of Ohio, and

Whereas the logical effect of that decision, if the same is valid, is to subordinate the power of the States in the regulation of electric railroad rates to the Federal commission, and practically to destroy the same as to a great part of the mileage of the country; therefore, be it

Resolved, That Congress be, and hereby is, respectfully urged to consider the situation that has come into existence as aforesaid, and to make such amendments to the existing law as shall make clear the extent to which if at all, the Interstate Commerce Commission is intended to be vested with jurisdiction over electric railroads.

RESOLUTION RELATING TO CERTIFICATES OF CONVENIENCE AND NECESSITY.

Whereas by the transportation act of 1920 the Interstate Commerce Commission was, in terms, given exclusive authority to grant certificates of convenience and necessity for construction and abandonment, not only of railroad lines which are interstate in character, but of railroad lines lying, or to be constructed, wholly within one State; and

Whereas the Federal Government ought not to undertake to authorize State railroads engaged in intrastate transportation, which have often been constructed in part by public aid from the State or subdivisions thereof, to abandon intrastate operation without authority from the State: Therefore be it

Resolved, That Congress be respectfully urged to amend the existing law so that certificates of convenience and necessity granted by the Interstate Commerce Commission shall not purport to relieve the carriers obtaining the same from conforming to the laws of the States with respect to construction and operation within the States for intrastate transportation, or with respect to the abandonment of such transportation.

RESOLUTION RELATING TO CAR SERVICE.

Whereas it is impracticable for the Interstate Commerce Commission to attempt to supervise the distribution of cars as between individual shippers throughout the United States; and

Whereas there should be some governmental authority within reasonable reach to which appeal can be made to require equitable distribution of cars without regard to whether the same are to be used for shipments interstate or intrastate: Therefore be it

Resolved, That Congress be respectfully urged to amend the interstate commerce act in such way that the regulatory authorities of the States may make reasonable orders and regulations, not in conflict with Federal law or with lawful orders of the Interstate Commerce Commission, requiring cars within the respective borders of such States to be equitably distributed to shippers desiring same, without regard to whether they are desired for use in shipments that are interstate or intrastate.

RESOLUTION RELATING TO AMENDMENT OF THE VALUATION ACT.

Whereas there are now pending in the House and Senate of the National Congress bills introduced by Congressman Sweet and Senator Cummins, respectively, each to amend section 19a of the interstate commerce act (which section is commonly referred to as the valuation act) so that the Interstate Commerce Commission shall not be required to include in its valuations of railroad properties any estimates of hypothetical damages for present cost of condemnation and damage in excess of present value or original cost of railroad lands; and

Whereas the present value of railroad lands, as appraised by the commission, and as the same will be included in the commission's valuations, if the proposed amendment shall be made, include in the aggregate a vast increase in value above the cost actually incurred by the railroads in the acquisition of their lands, and also vast sums representing the present value of lands which were granted free to the railroads by the Federal Government and by the States and subdivisions thereof, and by individuals; and

Whereas the inclusion of such present value will constitute generous treatment to the railroads, and the inclusion of hypothetical expenditures on account of imaginary present condemnation of lands, "in excess of present value or original cost," would result in immense increases in railroad values and increased demands for railroad revenues to pay returns thereon, with resulting unjust and unreasonable rates; therefore, be it

Resolved, That this association urges the prompt passage of the proposed amendment as an act of plain justice to the public.

Mr. BENTON. I will now take up these resolutions and discuss them in their order.

The CHAIRMAN. Mr. Benton, do you intend to discuss the Capper bill or the amendments which are proposed by your national association?

Mr. BENTON. Mr. Chairman, it was the desire of our national association to present the resolutions which had been adopted by the convention and to discuss, in a general way, these resolutions. Those discussions will be applicable to the Capper bill and to the Nicholson bill. And the discussion will go somewhat beyond those bills, because there are one or two matters which are not covered by those bills but which are covered by our resolutions. We will be glad, if we may, to discuss all of the resolutions.

Referring to the first resolution, I would say that it embraces two matters. (1) Safeguarding the powers of local regulation of carriers by the State; and (2) the repeal of section 15-a. While these matters are entirely separable, nevertheless they are in a way connected. They have been covered together in the resolutions.

The CHAIRMAN. So far as the first subject is concerned, the bill introduced by Senator Capper restores the law to its former language, I believe.

Mr. BENTON. I think the bill introduced by Senator Capper would make such amendments in various parts of the interstate commerce act as would restrain the Interstate Commerce Commission from making any order which would in any way affect any intrastate rate. The bill introduced by Senator Nicholson would clearly define and limit what is called the Shreveport power of the Interstate Commerce Commission. There is that difference in the two bills.

The CHAIRMAN. My question related to the bill introduced by Senator Capper. The first section of that bill, as I understand it, simply restores the law as it was before we amended it.

Mr. BENTON. It is my understanding, Mr. Chairman, that it does more than that.

The CHAIRMAN. The bill does more; but that section does that, with the exception of the proviso?

Mr. BENTON. Yes; that is true.

Senator KELLOGG. Did you mean to say that the Nicholson bill repealed the power of the Interstate Commerce Commission that was vested in it by the Shreveport case?

Mr. BENTON. No, Senator; I suggested that it was my understanding the Capper bill would do that but that the Nicholson bill is not quite so broad.

Senator KELLOGG. You think the Capper bill would repeal the power that has resided in the Interstate Commerce Commission ever since its organization in 1887?

Mr. BENTON. I would not phrase it that way, but ever since the Shreveport case——

Senator KELLOGG. Very well, the Shreveport case did not give the Interstate Commerce Commission any additional power. It got its power from the law itself. The Shreveport decision was not a legislative enactment.

Mr. BENTON. No; but——

Senator TOWNSEND (interposing). It was simply an interpretation of that law as it existed at the time.

Mr. BENTON. Of course it must be so understood. The Congress provided in explicit terms that nothing contained therein should apply to transportation wholly within one State, and it was not until the Shreveport decision that it came to be known by anybody that transportation from one point in one State to another point in that same State if deemed by the Interstate Commerce Commission to have effect upon interstate commerce was not "wholly within one State." Of course the Shreveport decision was an interpretation of the act, and Senator Kellogg is right in saying that we must consider the Interstate Commerce Commission had the power from the time the act was passed, although it was never before exercised in that way.

The CHAIRMAN. I want to get the matter clearly in my mind. The bill introduced by Senator Capper would restore the law as it was, so far as interference with State rates is concerned, leaving the Shreveport case and the Minnesota rate cases and the Illinois case in effect. The bill introduced by Senator Nicholson is intended to change the rule of the decision in the Minnesota rate cases and the Illinois case and the Shreveport case?

Mr. BENTON. Mr. Chairman, I think you have some other bill in mind instead of the Capper bill. I think that the proviso in the Capper bill explains its import, as follows:

"*Provided*, That the provisions of this paragraph shall not be construed to apply to any individual or joint rate, fare, or charge, or rates, fares, or charges on shipments moving wholly within one State, and that the jurisdiction to regulate all such intrastate rates, fares, and charges is hereby expressly reserved to the several States."

The CHAIRMAN. That would not be construed as changing the decisions in those cases to which I have referred, would it?

Mr. BENTON. That is a matter about which there may be two views. I have assumed the purpose of that was to do what I have said—either to do something or nothing. And I must assume that a court would assume that it was meant to do something and that it was intended to prevent interference by the Interstate Commerce Commission with State rates. If it does not so mean it would be idle to pass the bill.

The CHAIRMAN. It was clearly in my mind, because that is the way it is divided, as I look at it: (1) The change made in the law, if any, in the act of 1920; and (2) the change which is proposed, or the limitation which is proposed, of the effect of the decisions in those cases to which I have referred.

In other words, you want any change that was made in the act of 1920 modified, and you want also to restrict the effect of the decisions of those cases to which we have both referred. That is the general purpose on that point, as I understand it.

Mr. BENTON. The purpose of the Capper bill I have understood to be as I have stated. The purpose of the Nicholson bill has been not to terminate absolutely the Shreveport power of the Interstate Commerce Commission, but to define what that power is and the extent of it and the proof which shall be presented before the power is exercised.

I think it is proper to state that the committee on State and Federal legislation reported to the convention in Atlanta a resolution in favor of an absolute termination of the Shreveport power of the Interstate Commerce Commission. That resolution precipitated discussion. It appeared to be very largely supported. There was some opposition to it upon the ground that it might not be desirable to ask the Congress to go to that full length. Finally the resolution

was put in the form in which it was passed, and then it was passed unanimously.

As it now stands it asks the Congress to amend the interstate commerce act so as to clearly define and limit the power of the Interstate Commerce Commission so that no intrastate rate may be changed or set aside without proof by competent evidence and upon finding of facts made that the same is noncompensatory and injures a person or persons or a locality or localities engaged in interstate commerce to such an extent as seriously to diminish the business of such person or persons or seriously to retard the growth and development of such locality or localities.

And the third resolution attached to the whereases, all of which I refer to as one resolution, asks the Congress as an aid to the interpretation of such legislation as it may pass to declare its purpose to recognize the right of the several States to exercise full and final jurisdiction over all rates for intrastate transportation which do not injure persons in the manner aforesaid.

The CHAIRMAN. Your resolution substantially conforms to the Nicholson bill in this respect, that it charges the Interstate Commerce Commission with the duty of finding that the State rate is not compensatory before it can hold that it is unduly prejudicial or discriminatory?

Mr. BENTON. Yes.

The CHAIRMAN. That is the real effect of the Nicholson bill, as I understand it.

Mr. BENTON. Yes.

Senator TOWNSEND. Let me ask you a question there, please, if I do not interrupt you?

Mr. BENTON. Very well.

Senator TOWNSEND. Do I understand the object of your resolution is to restore to the States full authority to fix rates regardless of the interstate rate if such State rate of itself is compensatory to the people affected by it within the State, and regardless as to how it may affect other interests using that road, directly or indirectly, in an interstate transaction, and regardless of what effect it may have upon the system or railroad as a whole?

Mr. BENTON. Yes; it asks that each State be safeguarded in its right to make rates applicable purely to its internal commerce so long as it does not make a noncompensatory rate. If there is a variance between the Federal rate and the State rate because the State has fixed an unfairly low rate, then we do not say that the Federal Government should not require the State to advance that rate. But if the Federal Government, through failure to act, or through inadvertent action, has allowed an unduly high interstate rate, and the State has fixed a proper compensatory rate, and an investigation discloses a variance and that that variance should be removed, then we think the State should not have its law struck down, but that the correction should come where it ought to come, and that is by a change by the Interstate Commerce Commission of its unduly high rate.

The CHAIRMAN. In other words, you intend if the State fixes a noncompensatory rate that that question shall be tried out in the courts and not by the Interstate Commerce Commission?

Mr. BENTON. No; we have not gone to the extent of making that request.

The CHAIRMAN. Where would you try it out?

Mr. BENTON. That question may well be tried out in the Interstate Commerce Commission.

Senator KELLOGG. Yes; I judge that to be so by the terms of the Nicholson bill.

Mr. BENTON. Yes, sir.

Senator KELLOGG. That would seem to be the case, at least.

Mr. BENTON. Yes, sir. Of course, Mr. Chairman, the question arises, as President Jackson of our national association has suggested here to me, and must necessarily arise, as all the cases brought before the Interstate Commerce Commission do, on an allegation of discrimination. But the variance, if any, having been proved and the hurtfulness of it being proved, there must still be proof that the variance is the fault of the State in fixing a rate in violation of the law.

Senator TOWNSEND. In fixing what kind of rate?

Mr. BENTON. In fixing a rate unduly low.

Senator TOWNSEND. When you speak about an unduly low rate, will you take into consideration, if true, the effect that such State rate may have upon interstate traffic as a whole? Would the effect upon other States, for instance,

upon people engaged in interstate commerce generally, be taken into consideration?

Mr. BENTON. Senator Townsend, I con not conceive of any State commission not taking that into consideration. And, if I may proceed with my statement, I hope to show that they do take into consideration the needs of the carriers, not only with respect to their own State, but with respect to their needs for the support of their system and their service generally; I purpose to review the action of State commissions preceding the Federal orders that we are now here complaining of.

Senator TOWNSEND. I will be very glad to waive the question, of course, but was a little confused by some of your statements about this, as to what your general ideas are. But I will wait.

Mr. BENTON. I thank you. I desire to answer any question at any time, but wanted you to know that I had not failed to make preparation to cover that point.

Senator TOWNSEND. All right.

Mr. BENTON. Mr. Chairman, I have prepared for this hearing, somewhat hurriedly, a statement: I have been able to dictate a partial statement which I purpose to make, and I shall be glad if I may, to hand a copy of it to the reporter. And I would add that I have put certain captions into the dictated statement for the purpose of breaking it up and making it more easy of inspection by anybody who may not be at the hearings and who may desire to read the report of the hearings. If agreeable, I would like to have those captions put in the transcript without being obliged to read them.

The CHAIRMAN. Permission is granted.

THE TRANSPORTATION ACT, 1920.

Mr. BENTON. It is now 20 months since the transportation act was passed. It was the hope of those who framed and passed the act that it would settle the transportation problem. I think I may safely say that the transportation problem was never more unsettled than now. I believe, too, that candid men, who are capable of following results back to their causes, will say that in large part the present unsettlement, and the present insistent demand for further legislation, is directly traceable to the attempt which has been made to centralize the ultimate control of all rates affecting the commerce of 110,000,000 people, living in the 48 States of this great country, in the hands of a single board sitting in Washington.

The CHAIRMAN. I want to correct one statement you have made.

Mr. BENTON. All right.

The CHAIRMAN. I do not know of anybody who entertained the opinion that the transportation act would settle the transportation problem.

Mr. BENTON. May I amend that statement by saying, would tend to settle?

The CHAIRMAN. You may.

Mr. BENTON. This abrupt departure from the plan of government which was adopted by the founding fathers, and followed for 130 years, has shocked our people.

The results have not carried compensating advantages to anybody. They have injured the carriers. They have disturbed business. They have caused unrest and dissatisfaction among our people, who have seen their accustomed powers of government taken from them, and their local laws defied, and their local officials enjoined by Federal courts from enforcing their own laws within their own States. Thoughtful men everywhere, I think, view with misgiving this striking example of the present-day tendency to withdraw powers of government from the exercise of the people locally, and to vest them in the hands of a bureaucracy here in Washington.

THE COMMISSION'S ATTEMPT TO INCREASE ITS POWER.

The transportation act was the occasion for this attempt, rather than the cause of it. The attempt arose out of the great impulse toward centralization which came about as a result of the war, coupled with the insistent demands of carriers and with the effects of the widespread propaganda by which for many years they have sought to destroy State regulation.

Moved, as I assume and believe, by an entirely rightminded, but misguided, purpose, the Federal commission desired to extend its jurisdiction over the internal commerce of the States. In the transportation act, which was the

composite product of different minds, and accordingly not altogether consistent or clear in all its terms, the commission found language upon which it based a claim that such jurisdiction had been granted to it. The lower Federal courts have sustained this claim.

EXTENT OF DESTRUCTION OF STATE REGULATION.

Since the transportation act was passed, the Federal commission has made State-wide orders prescribing whole bodies of intrastate rates in 24 States. In other States similar orders, not state-wide, have been made.

In some cases the rates prescribed include all rates, passenger and freight; in some they apply to passenger rates; and in some to freight rates on specified commodities only. In every case the orders purport to remove the rates in question permanently from the control of the States, so long as the orders stand. In the States which have thus far been disabled from exercising powers of government, which have heretofore been unquestioned, live 64,136,192 people. These States are the following: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, and Wisconsin.

CONGRESS REFUSED EXPRESS GRANT OF POWER CLAIMED.

I do not need to remind you that when the transportation act was under consideration, Congress was asked to include certain words designed to grant to the Federal commission the power it now claims, and that it refused to include them; nor do I need to recall that when your chairman reported the bill, as it finally passed, to the Senate, he expressly stated that the bill did not extend the power of the commission over intrastate rates. I refer to Congressional Record, volume 59, part 1, pages 142–143.

I desire to read in part what was said about that. Chairman Cummins said:

"Most of you, I am sure, are familiar with what is known as the Shreveport decision. The committee has attempted to simply express the decisions of the Supreme Court of the United States. We have not attemped to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination, when established in a proper proceeding before that body—an authority which it does not now have."

If I may interject there I will say I understand that to refer to the power to prescribe a specific rate to take the place of the specific rate condemned, the power of the commission before having been to condemn a rate but not extending to prescribing the specific rate to be put in effect.

The CHAIRMAN. I may state that I am still of that opinion.

Mr. BENTON. You are still of that opinion as to what your intent had been?

The CHAIRMAN. No; of what we did.

Mr. BENTON. I am agreeing to what I read, that the committee attempted. I have no doubt of the attempt, and I agree with you as to what the construction ought to be. I will now continue reading from your statement, Mr. Chairman, on the floor of the Senate:

"I may say, for the benefit of the Senate, and especially say to the Senator from Tennessee, that the House bill originally proposed another element—that is, it proposed that we should declare that if the rates in force in any State did not sustain a fair share of the burden which the interstate carriers must bear, then the Federal authority should have the jurisdiction to take possession of the entire field and lift the rates so that the carrier should receive from intrastate business a proper share of the revenues which it must have in order to pay for maintenance and operation and a fair return upon the value of the property. That is the contention, and there is a great deal of merit in it. We have not thought, however, that we were justified in going to that extent. But I predict that it will not be many years before Congress will be compelled to go to that length. * * *

"But I do not want it to be understood that we have yet gone, and this bill does not propose to go, to the limit of our constitutional power. It leaves with the State authorities many things which, in my judgment, if we were to exercise our full power we could withdraw from the States. But the committee has not considered it wise to withdraw more than seemed to be absolutely

necessary under existing conditions. At any rate, Senators will now fully understand, I think, the operation of the section to which I have referred."

I would also read from the report made by the Committee on Interstate and Foreign Commerce of the House of Representatives upon the House bill:

"The provision practically enacts into law the decision of the Supreme Court in the so-called Shreveport case. Any undue burden upon interstate or foreign commerce is forbidden and declared to be unlawful. It is believed that the provisions of this section will have a beneficial and harmonizing effect and will tend to reduce the number of so-called Shreveport cases, while at the same time recognizing the regulatory bodies of the several States."

I would say that that report was made upon the House bill before it came to the conference committee and while it seemed to contain the "undue burden" words to which Senator Cummins referred when he reported the conference committee bill to the Senate.

The National Association of Railway and Utilities Commissioners, of course, were watching the legislation with a good deal of interest and concern. They were concerned by the "undue burden" provisions and they protested against them. When the House bill came to the conference committee they filed a memorandum protesting against those particular words.

I would like to present a part of that memorandum here for the purpose of showing you specifically how the matter of preservation of the power of the States with respect to State regulation was presented to the Congress. From this memorandum I will read only in part, and would ask, if I may, that it be incorporated in full in my statement, the part I ask to have incorporated being only four or five pages.

The CHAIRMAN. That may be done.

Mr. BENTON. The statement is as follows:

DEPRIVATION OF STATE COMMISSIONS OF THEIR PROPER POWERS.

By paragraphs (3) and (4) of section 13 of the commerce act, as proposed to be amended by section 415 of the House bill, the same appearing on pages 61 and 62 of the bill as printed under date of December 21, 1919, it is provided that whenever the Interstate Commerce Commission shall investigate "any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any State * * * the commission shall have authority * * * to make findings and orders * * * to remove * * * any undue burden upon interstate or foreign commerce * * *. The law of any State or the decision or order of any State authority to the contrary notwithstanding."

If this provision shall become law it will operate to deprive the State commissions of their powers to make with final effect any rate, service, or other regulatory order.

We make this subject the first for discussion in this memorandum because we deem it of most vital importance to the State commissions and to the people of the States whose interest they represent.

The question involved is whether Congress desires to preserve the powers of the State commissions or to destroy them. We are satisfied that neither the House nor the Senate intends to take the latter action, and that the language of the House bill here pointed out and protested against was adopted without a clear perception of its effect. We make the following suggestions:

1. The State commissions are absolutely necessary to shippers as local tribunals to which appeals may be quickly and inexpensively taken upon local matters.

2. If the provision of the House bill becomes law, every order of a State commission affecting either rates or service or in the nature of a police regulation will be subject to be set aside as the result of a second trial before the Federal commission.

3. The inevitable result will be to burden the Interstate Commerce Commission with a great number of proceedings relating to purely local matters. If there were no other objection to thus extending the jurisdiction of the Federal commission so as to make it in effect an appelate tribunal for all of the State commissions, the great amount of additional litigation which will thus be brought before the Federal commission, and which will unavoidably result in delaying its determination of more important matters, ought to be a conclusive reason against the proposed extension, unless some very distinct and important public advantage is to be gained thereby.

4. Instead of public advantage, such extension of jurisdiction of the Federal commission will result in distinct and important injury to the public interest. The special advantage to the public from the existence of State commissions with power to act on matters local to the States are (1) that they can be easily appealed to at little expense, (2) that they can act promptly, and (3) that they can act understandingly, because of the intimate knowledge which the State commissions have of the reasonable requirements of local situations.

5. Matters upon which State commissions act are often—ordinarily, we may say—not important enough so that the shipper affected can afford the time or the cost which would be necessarily involved in proceedings before the Federal commission to test the reasonableness of orders of the State commissions. It is also true that they are not important enough so that ordinarily they can be expected to receive the personal attention of the Interstate Commerce Commissioners. The appeal (for in practical effect that is what the act will give) will therefore be from competent State commissioners familiar with local conditions to examiners or other subordinate employees of the Federal commission, who have not the experience or the local knowledge of the State commissioners.

6. Moreover, the lawfulness of any order of any State commission can now be tested in either State or Federal courts, where the order is made, for both State and Federal laws provide the railroads full protection in the courts against either unlawful or unreasonable orders by State commissions. If the proposed provision becomes law the people of a State may be compelled to cross the continent to defend the orders of their State regulatory bodies, and they may see such orders set aside, not because they are unlawful but because some examiner of the Federal commission, exercising its powers, differs in judgment with the local officials. Heretofore the Federal system of government has worked well because the right of the States to regulate their local affairs has been respected. Now it is proposed to enact a statute which will destroy the powers of long-established local tribunals and subject the people of the States to the findings and orders nominally of the Interstate Commerce Commission, but actually (by reason of the very multitude of cases which will arise) of the subordinate employees of that commission.

We submit that a State order which is not confiscatory or otherwise unlawful, and which does not sufficiently discriminate against interstate shippers so that they desire to complain of it, may safely be left in effect; and that its validity should not be made to depend upon the result of a second trial before the Federal commission, upon the mere motion of a carrier which hopes that by prolonging the proceedings it may avoid some expense, or in some manner be permitted to evade the order.

7. Under the language protested against any order or regulation of a State commission as to rates, service, or facilities will be unlawful if found and declared by the Federal commission to be an "undue" burden. Any order which involves cost to a carrier is a burden on all commerce moved by that carrier, whether intrastate or interstate. There is no definition of the word "undue" as used in the act. It is impossible to know what meaning may in the course of litigation finally become attached to it. Ordinarily, however, the conclusion of the Federal commission will be final so far as shippers are concerned, and any order involving cost which the examiner hearing the case deems undesirable will be found by him to cause an "undue" burden, and will by that mere finding and the issuance of an order accordingly come to be unlawful. Upon this point we can not over emphasize the opposition of our organization to the language of the bill.

8. As telephone companies engaged in exchange of interstate messages are interstate carries within the provisions of subsection 3, page 61, of the House bill, and section 43, page 172, of the Senate bill, these rates, fares, charges, classifications, regulations, and practices would become subject to these provisions of either act. We do not feel that either the House or the Senate had especially in mind the effect of these provisions upon telephone regulation throughout the country. At least 90 per cent of all telephone business is intrastate, yet the effect of these provisions might be to throw upon Federal authorities at Washington an overwhelming mass of complaints brought by the telephone companies or encouraged by them, to review all local rates in connection with interstate rates, fares, practices, and regulations, the result of which would be to cast an intolerable burden upon Federal authorities and greatly interfere with local and State control of telephone companies. There is no public necessity or demand for any such far-reaching proposal. It is questionable whether such a law could be administered at all in connection

with the telephone business. We therefore respectfully suggest to this honorable committee that some provision be placed in the act showing clearly that it was not the intent to place telephone companies under the provisions of the sections referred to. When the final bill is given section numbers a short provision on to the effect that this section is not applicable to telephone companies will effect this purpose.

At the expense of repetition we desire to emphasize that if the provision objected to becomes law no State commission can make any final order such as the following:

(*a*) Fixing reasonable and nondiscriminatory rates to meet peculiarly local conditions.

(*b*) Fixing commutation passenger rates.

(*c*) Fixing rates for any kind of local passenger or freight service.

(*d*) Requiring reasonable train service or car service.

(*e*) Requiring sidetracks to be installed or spur tracks to be extended, or any kind of terminal service.

(*f*) Requiring physical connection of railways for interchange of traffic.

(*g*) Requiring the abolishment of grade crossings or their protection.

(*h*) Requiring the provision of toilet facilities.

(*i*) Requiring facilities for livestock loading.

(*j*) Requiring a carrier to do anything involving the expenditure of money or requiring the use for local shippers of adequate equipment or facilities of any kind.

(*k*) Any order made by State commissions relating to rates or service of telephone or telegraph companies.

No better illustration can be found of the far-reaching effect of these appeals than that relating to the extremely important public interest of grade separation, in the expense of which many of the States share. These matters are handled expeditiously by the States. Appeals from decisions of State commissions as to such orders would simply perpetuate dangerous conditions by inevitable delay attendant upon the appeal. Certain carriers are now delaying compliance with such orders and boldly state their reasons to be that the Federal commission will soon assume jurisdiction over these matters.

It is not sufficient to say that the Federal commission can be trusted to act reasonably in the exercise of the power proposed to be granted. The Federal commission shuold have nothing to do with these purely local matters.

Jurisdiction to review the countless cases that come before the State commissions can not be vested in the Federal commission without causing such serious delays as will be intolerable to shippers, and without so hampering State commissions as practically to destroy their usefulness.

We do not believe it is the intent of either House of Congress to insert in the bill to be passed any provision which will have this result.

The CHAIRMAN. I think it only fair at this point to say that while the bill was in conference I had a meeting with you and with others representing the National Association of Railway and Utilities Commissioners, and my recollection is that you agreed with me that the bill, with the changes that we made in it or changes that were made in the House bill, would be satisfactory and would not extend the Federal power over State commissions beyond the Shreveport case; is not that true?

Mr. BENTON. Mr. Chairman, it so happens that at that time, while I was in my present position I had just succeeded Mr. Elmquist, and at the conference which I think you now refer to I did not happen to be present. I think President Jackson was present. I had, however, various conferences with you, and I have no question that I expressed the view, which I certainly entertained, that with the elimination of the "undue burden" words and the substitution of the word "discrimination," a word which had been construed by the courts, the Interstate Commerce Commission or the courts would be prevented from attaching any such interpretation to the act as they have since attached to it. It is the situation which has since developed that has brought us here and not what the Congress intended to do; it is what the Interstate Commerce Commission and the courts have held that you did do.

The CHAIRMAN. I have no disagreement about that. The situation may have changed very much in view of the holdings by the Interstate Commerce Commission and the inferior Federal courts. But I think everybody ought to know that we did the best we could to hold the law as it was, with the exception of the additional power on the part of the Interstate Commerce Commission, to

substitute a rate which had been condemned by it as discriminatory; and that the members of that committee—and I can not recall now whether you were present or not—but the members of that committee agreed with us that the language we were proposing to employ would not interfere with the power exercised by and the authority on the part of the States.

Mr. BENTON. I should have done so had I been there. But President Jackson was there, and I would like for him to make a statement.

Mr. Carl D. Jackson, president of the National Association of Railway and Utilities Commissioners. Mr. Chairman, I do want to make a statement at this time, because I was probably present at the conference with you, and I do not want anything to go on here which might misinterpret our general position, or your position, or the position of the members of the committee present at that time. I think it was the feeling of that committee, and I think it was the feeling of ourselves and of Senator Cummins, that as a matter of fact the bill did not increase, except in that one way which the chairman has spoken of, the powers of the Interstate Commerce Commission over intrastate rates beyond the Shreveport decision. I think that is one reason we are here; we feel that the law has been misinterpreted by the Interstate Commerce Commission and the courts, they going far beyond the Shreveport decision.

The CHAIRMAN. Oh, yes; and I am not making the suggestion as a reason for not modifying the law, but I wanted the record to show that we did what we could do and all we could do to bring the transportation act of 1920 into conformity with the views of the National Association of Public Utilities Commissioners on this point.

Mr. JACKSON. And I know that we had a discussion of it on yesterday, and we said we felt all the way through that that was the intention of your committee, but that it has been misinterpreted, interpreted quite differently from what the Senate Committee or our own committee expected.

Mr. BENTON. I want to take up now the effect of the orders made by the Federal commission in these 24 States. They have produced a condition of chaos, so far as regulation is concerned. The orders disable the States by removing the rates from their control, but after they have been made the Federal commission has no jurisdiction over their reasonableness or over the question of the relation of one State rate to another. The only ground of jurisdiction by the Federal commission being a discrimination between the State and the interstate rate. When it has cured that discrimination, as it thinks, by prescribing the State rates, it has no jurisdiction upon a complaint that the State rates are too high or that one State rate is discriminatory as to another. And we thus have the spectacle of vast bodies of rates tied up by Federal orders and beyond the regulation of either the State or the Federal commission. This aspect of the situation will be later illustrated by specific examples.

This wresting of legislation to purposes for which it was never planned has paralyzed effective regulation of State rates for the present. It has produced also a mass of litigation in the courts, wherein the States are seeking to preserve their rights of local government. Nobody knows how this litigation will result. Nobody knows how many years it will take to settle all the questions involved.

I may say that the Wisconsin rate case reached the Supreme Court last January. Every effort was made to expedite it. It was set down for argument at the end of February. It was reached for argument on the 13th of March, and was argued then and submitted. It remains undecided. Whether it will remain undecided as long as the Minnesota rate cases remained undecided of course nobody knows.

In the meantime the States are disabled, and the public suffers from their disablement. So it is that their representatives come here and ask you to make such changes in the existing law as shall make it clear that the regulation of the internal commerce of each State is left to that State.

PROCEEDINGS BY FEDERAL COMMISSION SUBSEQUENT TO PASSAGE OF THE TRANSPORTATION ACT.

In order that you may determine the extent of the need for present legislation clearly defining the limits of the power granted to the Federal commission, I think there ought to be put into the record a succinct statement of what the situation was as to State rates when the commission made the orders disabling the States as aforesaid, what the orders purported to do, and what the effect of them has been.

ATTITUDE OF STATE COMMISSIONS TOWARD COOPERATION.

You will remember that you incorporated in paragraph (3) of section 13 of the interstate commerce act language recommended by the Federal commission and by the State commissions, under which it was expected that cases of alleged discrimination between State and Federal rates would be considered in joint conferences and joint hearings, wherein the regulatory bodies of the Federal Government and of the States affected might both participate, and wherein common understandings and common conclusions and common agreements might be reached for the abatement of any discriminations that might in fact be found to exist.

You will remember that, explaining this provision before the House committee, the commissioner who spoke for the Federal commission said:

"The idea under the proposed amended act is that every reasonable, feasible effort shall be made to bring the conflicting views of the State commissions, if they do conflict, and the views of our own commission into harmony through a very careful investigation which all are invited to participate in, and in which everybody would be heard, and in which every reasonable effort would be made to reach a mutually acceptable understanding; but the possibility of inability to reach such an understanding would be protected by a reservation of the power to finally decide it, if necessary, by the Federal tribunal."

I point out in passing the use of the words "reservation of the power," showing the clear recognition on the part of Mr. Clark that it was not a new power that was given to the commission. It was the power which the commission then had, but theretofore was exercised, proceeding alone, to abate discrimination against interstate rates which might be found. The change was made in Congress in order that the State power might not be ruthlessly struck down, struck down through failure of understanding of the local situations which the State officials would know about more than the Federal Government; provided for calling into conference on the joint hearings of the State commissions, but reserved to the Federal commission the same power it had before of abating actual discriminations found, if agreements were not reached.

After the transportation act had passed, and before it had been signed by the President, the president of the National Association of Railway and Utilities Commissioners waited upon the chairman of the Interstate Commerce Commission, and assured him of the desire of the State commissions generally to cooperate with the Federal commission with the genuine purpose of securing harmony of action within their respective spheres. It is proper to state that this assurance was received by the chairman of the Federal commission with expressions of satisfaction.

On May 12, 1920, the Federal commission—having theretofore ordered a general investigation of rates known as ex parte 75—extended to the National Association of Railway and Utilities Commissioners an invitation to appoint three State commissioners to sit with the Federal commission in the hearing in ex parte 74. That hearing was sometimes referred to as ex parte 74, sometimes as the 1920 Advanced Rate Case. While it was recognized by the State commissions that the case in which they were invited, to the extent indicated, to participate, was a revenue-rate case and not a discrimination case, involving relationship between State and Federal rates, and hence did not fall within the class of cases contemplated in said paragraph (3) section 13, it was thought well that they should, upon the first opportunity offered to them, demonstrate the sincerity of the assurances which had been conveyed to the Federal commission by their president. Although the time was scant, two conferences of State commissioners were held prior to the opening of the advanced-rate hearing, which opened, as I now remember, 12 days after the invitation was extended. Two conferences were held, which were attended by representatives of a majority of the State commissions. A committee, consisting of Hon. W. D. B. Ainey of Pennsylvania, Hon. John H. Guiher of Iowa, and Hon. Royal C. Dunn of Florida, was appointed, these gentlemen from these respective States being members of their respective State commissions.

The invitation, as extended and accepted, expressly provided that "such participation or cooperation shall not prejudice the rights and powers of the Interstate Commerce Commission as to interstate commerce under Federal laws, or the rights and powers of such State commissions as to intrastate commerce under the laws of their respective States."

The men so designated sat in Washington with the Federal commission throughout the summer months when ex parte 74 was upon hearing and under consideration. They made a report to the president of the National Association of Railway and Utilities Commissioners, in which they expressed approval of the Federal commission's order as to interstate rates, and further said: "The reasons requiring an increase of interstate rates are very persuasive of the need of increase in intrastate rates. The operating revenues of the railroads under prsent rates and conditions are recognized by all persons as insufficient."

THE PARTICIPATION OF MEMBERS OF THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS IN EX PARTE 74.

A full statement of participation by members of the National Association of Railway and Utilities Commissioners in the ex parte 74 hearing was contained in a supplemental brief which I filed in the Wisconsin rate case in the United States Supreme Court. If I may I would like to present a part of that statement to be incorporated at this point in my testimony here, and I offer it.

The CHAIRMAN. It may be incorporated in the record.

The CHAIRMAN. I suppose we will have to suspend at this time, because no one can tell at what moment a vote will come on in the Senate. This is a very important matter. I can not imagine anything more important in railway regulation than this question of a conflict between the State and Federal power. And I hope that the members of the committee will sacrifice their own convenience and be willing to meet at half-past 9 to-morrow morning, so that we may get along as rapidly as possible, and if there is no objection we will take a recess now until half-past 9 to-morrow morning.

(Thereupon, at 11 o'clock a. m., a recess was taken until Tuesday, October 25, 1921, at 9.30 a. m.)

[In the Supreme Court of the United States. Railroad Commission of Wisconsin et al., appellants, *v.* Chicago, Burlington & Quincy Railroad Company, appellee.]

SUPPLEMENT TO BRIEF FILED AMICI CURIAE ON BEHALF OF FORTY-TWO STATES BY THEIR ATTORNEYS GENERAL AND OTHER COUNSEL AND BY THEIR RAILWAY AND UTILITIES COMMISSIONS.

STATEMENT AS TO PARTICIPATION OF STATE COMMISSIONERS IN THE EX PARTE 74 RATE HEARING.

Inasmuch as both the chief counsel of the commission and Mr. Scott, in their respective briefs, have referred to the participation of State commissioners in the hearing and consideration of Ex parte 74, we deem it proper to make some reference to that matter.

It is not made clear in the briefs referred to what the purpose of the reference to such participation is. We assume that the design is to claim that the commission has complied with the provisions of section 13 (3), which, as we interpret them, require the Federal commission to offer opportunity for cooperation to the rate regulatory authorities of the State in any case where the rate-making authority of such State may be affected by the final order of the Federal commission. We will answer that claim a little later.

If, however, it is the purpose to claim, expressly or by implication, that, because of such participation, the State of Wisconsin is now in any way precluded from determining to what extent, if at all, its local rates shall be advanced, we may say we think that claim is far from having any foundation.

The Wisconsin commission did not take part in the joint hearing in Ex parte 74. The individuals who make up the National Association of Railway and Utilities Commissioners chose a committee of three men, none of them from Wisconsin, who did sit. Furthermore, the intrastate rate situation in Wisconsin was in no way before the commission in that proceeding. From this it appears to us quite clear that the action of the gentlemen who did sit, from the national association, could have no legal effect upon the freedom of action of the Wisconsin authorities.

But it ought not to be argued that it has any moral effect upon the freedom of action of the Wisconsin commission to administer the law of Wisconsin upon the facts as they appear in proceedings brought before that commission. If that is done it must necessarily render action by State officials under the cooperative provisions of section 13 (3) impossible, for no State commission can

surrender responsibility for its official acts into the hands of persons who do not compose such commission.

We believe it to be clear that it was not the intent of section 13 (3) that entrance upon a joint conference or a joint hearing, even in a case strictly of the character described in that section, should have the effect to deprive the authorities participating of the power and the responsibility to exercise their functions, within their respective spheres, according to their own judgment upon the facts found by them. Full freedom of final action must necessarily remain unaffected. Cooperation merely affords opportunity for more complete understanding of all relevant facts and opens the way for the avoidance or removal of discriminations through the reaching of common understandings.

OFFER OF STATE COMMISSIONS TO COOPERATE.

It is not improbable that the invitation to State commissioners to sit in Ex parte 74 was extended by the Federal commission by reason of the action of the national association, which was referred to in a brief filed by the association in proceedings before the Federal commission in the New York passenger fare case, as follows:

"Before the President's signature was affixed to the transportation act of 1920 the officials of the National Association of Railway and Utilities Commissioners conferred with the chairman of this commission and assured him of the desire of the State commissions generally to cooperate with this commission with the genuine purpose of securing harmony of action within their respective spheres."

RESOLUTION OF NATIONAL ASSOCIATION ACCEPTING INVITATION OF FEDERAL COMMISSION.

While the State commissioners assumed the burden of labor involved in accepting the invitation extended by the Federal commission, they did not understand that their effort to effect the full purpose of the law would be held to prejudice their freedom of action officially. The invitation was accepted in a resolution of the national association communicated to the Federal commission, as follows:

"Whereas the Interstate Commerce Commission has extended to this association an invitation to cooperate with that commission in the matter of applications pending before it for increases in carrier rates in the three classification territories by the appointment of three representatives of the association, members of State commissions having regulatory jurisdiction over intrastate rates of carriers, to sit with the Interstate Commerce Commission upon the hearing of such applications, and to consider with the members of that commission what increases ought justly to be made, with the clear understanding that such participation or cooperation shall not prejudice the right and powers of the Interstate Commerce Commission as to interstate commerce under Federal laws, or the rights and powers of the several State commissions as to intrastate commerce under the laws of their respective States: Therefore be it

"*Resolved*, That this association accepts such invitation, and that three such representatives of this association be selected, in such manner as the association may by vote determine, to sit with the Interstate Commerce Commission upon the hearing and consideration of said applications upon the understanding expressed in such invitation."

STATEMENT FOR NATIONAL ASSOCIATION AT HEARING IN EX PARTE 74 CONCERNING PARTICIPATION THEREIN.

While the hearing in Ex parte 74 was proceeding, the following statement was made by counsel for the National Association of Railway and Utilities Commissioners, at page 2275 of the record:

"Now in view of the colloquy which took place the other day between Mr. Campbell and Judge Thom, I desire, while I am speaking, to say something on the record about the relation of this record to State commission proceedings, and especially about the action of the national association in causing the same to be distributed. It is desirable that there shall be no possibility of misapprehension as to that.

The record has been distributed at the instance of the National Association of Railway and Utilities Commissioners at the expense of the carriers who are presenting their case here. Arrangements came to be made in the following manner:

"At the meeting of State commissioners held in Chicago to consider the invitation for cooperation extended by this commission, a committee was appointed to make arrangements for the convenience of the State commissioners in connection with the hearing here. It was desired that the suggestion should be made to your commission that the record be printed in daily installments and distributed to all the State commissions. It developed that under the terms of your contract with the official reporters this could not be done. The committee thereupon suggested to counsel for the carriers that they cause the record to be distributed from day to day during the progress of the hearing, so that the State commissions might be enabled to follow the hearing. This they readily agreed to do.

"The use which could be made of this record in State proceedings was discussed. Counsel for the carriers were advised that the national association could make no attempt to say what any State commission would do with respect to accepting the record made here; that obviously each commission must determine that matter for itself, in view of its own law, and its own judgment as to what its course ought to be, but that the view of those commissioners who had expressed themselves at Chicago had been to the effect that, so far as their own commissions were concerned, hearings might be expedited by introducing the record as made here, without calling again the witnesses placed upon the stand here. Such record would, of course, be supplemented by evidence desired to be offered as to the State case either by carriers or by others. It was well understood that no attempt was made to state that this course of procedure would be in accordance with the law and acceptable to the commission in every State.

"At the meeting of State commissioners held in Washington on May 22, to reach a final determination concerning the invitation which this commission had extended, the matter of the use of the record to be made at this hearing was further considered. A resolution was offered recommending to the State commissions that, in the rate proceedings growing out of the advances now asked in the several States, the record made here be received as a part of the record in the State proceedings. Upon a vote only four commissioners voted against the resolution. The opposition of those commissioners, so far as expressed, was based not upon a disinclination so far as their own commissions were concerned to admit the record if offered, but instead upon the opposition of those commissioners to the principle of recommending to any commission what its ruling should be upon evidence to be offered before it.

"The entire propriety of that view impressed the meeting, and upon motion the vote was reconsidered, and the resolution withdrawn, so that when the matter of receiving this record comes up before any commission, that commission may be certain that the national association has not in any way encroached upon its prerogatives, even so far as to recommend what shall be done with respect to the use of this record. That is a question which must be decided by each commission upon its view of the law which governs it, and its view of what its own action ought to be.

"Upon one matter I am sure I can speak without reservation for all of the commissions which act through the national association. It is their wish to cooperate with this commission to the fullest extent possible. In any matter concerning which in the exercise of their respective powers the Federal and State commissions have jurisdiction, the facilities, and the assistance of the State commissions are yours upon request. They desire to help in giving the fullest effect to the cooperative provisions of the transportation act, which provisions represent a constructive legislative attempt to facilitate harmonious action in the exerecise of State and Federal powers of regulation.

"The State commissions recognize that harmony can not be attained by disregard on the side either of Federal or State power of the rights and duties of the other side. When common action is necessary, it is not likely to come through one side determining what the action ought to be and then inviting the other to cooperate by taking that action. In such cases harmony can only be insured by frank cooperative action from the beginning, and by comparison of views, and by a genuine attempt to reach together a common judgment.

"Accordingly, the State commissions welcome the action which your commission has taken in this proceeding, because it indicates a recognition of that fact upon your part. It is hoped that as time goes on the State and Federal commissions may come to work easily together, so that in conformity with the spirit of our dual plan of government the people in local matters may continue to enjoy the benefits of local regulation, and so far as the interests of the several States are affected the people of the Nation may enjoy the regulation of this tribunal, the State and Federal authorities complementing each other and operating without conflict.

"In the domain of politics our plan of government has worked well, not because it was so designed as to offer no opportunity for conflict between State and Federal powers, but because generally our people have had such capacity for government as to avoid conflict. They have bent their efforts toward showing not that the Federal plan must work badly but that it could work well. There has been no disposition on the part of the Federal Government to override the powers of the States, nor on the part of the States to disregard the Federal authority. There has been instead a disposition to expect respect of rights and to extend respect of rights, to accommodate views, and to deal with important questions arising in a broad, constructive, American way, and to 'carry on,' doing in each case what ought to be done to meet the situation.

"There is easy opportunity for constant conflict and litigation and ill feeling to arise from clashes between State and Federal powers of regulation, but I believe the men who are on the regulating commissions, both State and Federal, are approaching the question of avoiding these clashes in a spirit which promises success. Success will not be easy, but achieving it is a part of the problem of making our dual form of government work well. The State commissions view the actions of this commission in this proceeding as a step in the right direction, and in what they have done they sought to indicate their desire to cooperate with you."

THE REPORT OF STATE COMMISSIONERS IN EX PARTE 74.

Because Mr. Scott has been misled by a reference to the report of the commissioners who sat in Ex parte 74, which he reproduces in his brief, we think it proper to present herewith in full the paragraphs of that report in which their approval of the action of the Federal commission as to interstate rates was expressed, and in which they made certain recommendations as to intrastate rates, as follows:

"The commissioners were not of one mind on all questions and their conclusion in many cases was the result of recognizing that the views of the other man must be taken into account and that there must be some surrender by each before an agreement could be reached. In some instances the conclusion of the majority is the view expressed in the ruling. On some of the questions our views were not in full accord with the majority and in some instances we three State commissioners did not have unity of view. However, when all matters are considered, and remembering that where 13 men are considering controverted questions and proposed policies, their differences of opinion must be composed or decided by the majority, we believe that the conclusion, considering all things, is just and fair and we give it our approval.

"The increased rates permitted under the ruling in Ex parte 74 will probably go into effect September 1, 1920. The reasons requiring an increase of interstate rates are very persuasive of the need for increase in intrastate rates. The operating revenues of the railroads under present rates and conditions are recognized by all persons as insufficient. A part of the responsibility to meet the situation rests upon the State commissions. Such increases as will be made in intrastate rates should, if possible, be made effective September 1, 1920."

It will be noted that it is not a fact, as Mr. Scott was led to believe, that the three State commissioners who sat with the Federal commission recommended similar increases in intrastate rates. Ex parte 74 related to interstate rates only. The applications for intrastate increases were not before the Federal commission in that proceeding, and it would have been clearly improper for the three State commissioners who sat to recommend what action should be taken in cases which they had not heard nor been informed about. It was proper for them to suggest that such increases as might be allowed in intrastate rates should be made effective, if possible, at the same time as interstate increases.

THE INVITATION BY THE FEDERAL COMMISSION TO STATE COMMISSIONERS TO SIT IN IN EX PARTE 74 WAS NOT A COMPLIANCE WITH THE LAW IN THIS CASE.

We think the only purpose of the reference made by counsel on the other side to the participation of State commissioners in Ex parte 74 must be to support the claim that thereby the Federal commission complied with the requirements of section 13 (3) as to this case. Concerning that claim, we say that Ex parte 74 was not this case, which involves Wisconsin rates. The nature of the order of investigation, made by the commission in this case, was such that it appeared that the rate-making authority of the State of Wisconsin might be affected by the result of the proceedings. Under the act, as we construe it, the Federal commission should have asked the cooperation of the Wisconsin commission. Had that been done, such recommendations might have been made by the Wisconsin commission to the legislature of that State that before now such changes, if any, as appeared desirable, as a result of the joint proceedings, would have taken effect, and this litigation thereby would have been rendered unnecessary.

CONCLUSION.

We believe the action of the Federal commission and of the National Association of Railway and Utilities Commissioners in Ex parte 74 was a step in the right direction, and that to the cooperation which resulted may in large part be attributed the celerity with which hearings were held and concluded, which finally led, in the brief space of two months' time, to the orders of State commissions which have been digested and shown on the tabulation at page 161 of our principal brief.

We point out, however, that Ex parte 74 was not the character of rate case that the provisions of section 13 (3) were designed especially to provide for. Those were cases directly involving intrastate rates claimed to be discriminatory against interstate commerce.

Whether a difference in rate levels is "undue, unreasonable, or unjust" depends upon the effect which changing it would have upon State commerce, as well as upon interstate commerce. If a great injury would be done to State commerce by the change, and only a slight benefit would be obtained by interstate commerce, the discrimination may not be unlawful.

We think the intent of the cooperative provisions was to safeguard intrastate commerce, and the rights of the States, from orders of the Federal commission made without full knowledge of State situations. It provides a way whereby the Federal commission may have the aid of the cooperative effort and helpful suggestions of State commissions during the hearing, made not in any contentious way, as parties to the proceeding, but subject to the sense of official responsibility which would exist in a joint conference or joint hearing, such as is contemplated by the statute.

As we understand the rule, whether "may" or other permissible words shall be construed as equivalent to "shall" depends upon the probable intent of the legislature, and if it is necessary to construe the same as mandatory to prevent the purpose of the act from being defeated, such construction will be adopted.

When public interests and rights are concerned, it will not be supposed that Congress intended to leave those interests to be served or not according to the fancy of the commission, but rather that the power was conferred with the intent that it should be exercised.

If it is pointed out that in the first sentence of section 13 (3) the word "shall" is used, whereas in the second sentence, now under discussion, the word "may" is used, and this is claimed to indicate an intent to give discretion to the commission, we would point out that "may" was necessarily used, for the reason that cooperation would depend upon the disposition of the State regulatory authorities to avail themselves of the opportunity to cooperate. Congress refrained from using the word "shall" because of the fact that cooperation might prove to be impossible, but in using the word "may," followed by the words "and to that end is authorized and empowered * * * to hold joint hearings," Congress granted a power, not for the benefit of the commission, but for the benefit of the people of the United States, and especially for the benefit of States whose rates might be brought in question by proceedings before the Federal commission.

We urge that this is a case which particularly calls for the application of the rule to which we have called attention. This plan of cooperation between State and Federal commissions was designed to coordinate the activities of the State and Federal commissions, and to make it possible for them severally to exercise the powers that properly belong to them, and yet without conflict.

In no one of the 16 State cases so far decided under the transportation act has the Federal commission seen fit to use the power that was given it to avail itself of the proffered cooperation of the State commissions in the States affected. We have no wish to question the rightness of the motives of the Federal commission, but we do feel compelled to point out that the purpose of the act is defeated when the commission thus refuses to avail itself of the power granted to it.

If it be said that the proceedings are in the nature of a review of the action of State authorities, and that it would be anomalous to have a subordinate board sitting with the reviewing board upon such a review, there are two answers in this case.

The first is that, if the proceedings are in the nature of a review, Congress knew it, and made the cooperation of the subordinate board lawful by section 13 (3).

The second is that in this case, as in most of the cases so far decided, the rates in question so far as the States were concerned were statutory and the State commissions had no jurisdiction over them. Accordingly in this case such suggestion would not apply.

We believe that nothing could be done which would go so far toward putting an end to Shreveport litigation in the courts as a decision in this case that this power of cooperation vested in the commission by Congress is not to be exercised according to the inclination of the Federal commission, but whenever a case arises in which is called in question intrastate rates which are claimed to discriminate against interstate commerce.

Respectfully submitted.

JOHN E. BENTON,
For the Railroad and Utilities Commissions of Forty-two States,
General Solicitor, National Association of
Railway and Utilities Commissioners.

MODIFICATION OF TRANSPORTATION ACT, 1920.

TUESDAY, OCTOBER 25, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in room 410, Senate Office Building, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. You may proceed, Mr. Benton.

STATEMENT OF MR. JOHN E. BENTON—Resumed.

Mr. BENTON. In the ex parte 74 proceedings the Federal commission divided the country into four rate groups, designated as the Southern, Eastern, Western, and Mountain-Pacific groups.

The CHAIRMAN. You are speaking of advances in State rates made by the Interstate Commerce Commission, are you?

Mr. BENTON. I am speaking of advances in interstate rates made in ex parte 74.

Senator FERNALD. Mr. Chairman, may I ask for information, are we considering bill S. 1150 or are we entering into a general discussion of this subject?

The CHAIRMAN. Really, we are considering bills S. 1150 and S. 2510, but there will inevitably be drawn into the hearing before it is closed all the bills which propose to amend the transportation act.

Senator LA FOLLETTE. Yes; that is the situation as I understand it.

Senator FERNALD. All right. I am to understand that we will probably have a general discussion of the whole subject.

Mr. BENTON. It approved, but did not order, advances in rates as follows:

As to passenger rates and rates on milk and cream, 20 per cent advance in all groups; as to Pullman rates, a 50 per cent advance for the benefit of the rail carriers in all groups; as to freight rates, with certain exceptions as to particular commodities, 40 per cent in the Eastern, 25 per cent in the Southern, 35 per cent in the Western, and 25 per cent in the Mountain-Pacific.

EXPEDITIOUS ACTION OF STATE COMMISSIONERS IN GRANTING ADVANCES.

After the Federal commission had granted advances as stated, the carriers applied to the several State commissions for permission to advance State rates.

Senator LA FOLLETTE. Did you state the date of that advance?

Mr. BENTON. The advance took effect August 26, 1920, under an order of the commission which was made July 29.

Senator LA FOLLETTE. I wanted it to be in the record in connection with the statement.

Mr. BENTON. Thank you.

The disposition of the State commissions was to cooperate with the Federal commission in every way possible, without surrender of the powers committed to them, and without neglect of the duties laid upon them by the laws of their respective States.

The gentlemen who sat with the Federal commission in ex parte 74, in a report addressed to the president of the national association, which has been put into the record, recommended expedition in the allowance of such advances in State rates as should be granted. Every effort was made by the commissions to comply with this recommendation.

Within two months every State in the Union had permitted increases, with four exceptions. One of these was where the action of the State commission

was enjoined; another was the Kansas commission, where a complicated situation existed, which will be later explained to you; the other two were States where the carriers refused to comply with the plain provisions of the State law, that increases in rates applied for must be shown to be necessary by evidence offered.

Senator LA FOLLETTE. Will you name the State where the injunction was invoked and the other two States referred to, if you are able to do so.

Mr. BENTON. The State where the injunction was granted was North Dakota. In that State the commission allowed the advances, both passenger and freight, asked for by the carriers, practically pro forma. The State supreme court enjoined the advances, as I now remember it, upon the ground that the commission had not met and acted as a body, only one member being present. Following that the commission met and, acting as a body, granted the increases. The State supreme court then enjoined the advance under the second order named upon the ground that there had been no real investigation of the merits of the proposed application. Thereupon the commission proceeded, under the order of the court, and entered upon an investigation, which disclosed that the rates in North Dakota were already on a level sufficiently high so that they ought not to be raised, and finally the advance was denied by the North Dakota commission upon that ground.

The question may arise in the mind of Senator La Follette, or in the mind of any other Senator, how it happens that in North Dakota there was no occasion for an increase in rates if the situations in other States required increases. I was not counsel in that particular case. I have been advised, however, by Mr. Karl Gartner, who conducted the proceeding for the State commission—and I am sure he is known to members of this committee, as he was long connected with the Interstate Commerce Commission—that the explanation of that somewhat peculiar fact is this: That in years gone by in the States of Minnesota and South Dakota the people were fortunate in having commissions that were active; that there had been rate reductions in those States which were not accompanied by a corresponding rate reduction in North Dakota. So that the situation was that without the advance as it was allowed to take effect in Minnesota and in South Dakota the rates were already on a substantially corresponding level in North Dakota. And the investigation made by the North Dakota commission indicated that upon a valuation which they made under the then existing rates and under any normal movement of traffic, the carriers were already earning in excess of 6 per cent. That is the State where the injunction proceedings occurred.

Now then, the States where the carriers refused to comply with the law were——

Senator LA FOLLETTE (interposing). Really then the situation was that the commission, after being twice enjoined, on investigation reversed its former action?

Mr. BENTON. Yes; reversed its pro forma action. But the records show that there was no real investigation of the merits, and the action of the Supreme Court in granting the injunction prayed for was upon that ground.

The two States where the carriers refused to comply with the law which forbade the State commissions to allow an advance except upon application made and proof produced that the advance asked for would be reasonable, were the States of Arizona and Nevada. In those States the carriers refused to introduce any evidence whatever, claiming that the States were foreclosed as to their action on intrastate rates by the order which the Interstate Commerce Commission had made as to interstate rates.

The chairman of the Public Service Commission of Nevada will make a particular statement to you with respect to the Nevada situation, which corresponds in a general way with the situation in Arizona. And I think you will reach the conclusion that the reason the carriers refused to make the showing required by law was because they could not do it, because the rates in those States, both interstate and intrastate, were already on a basis so high that to propose further increases was to propose what any tribunal making an investigation and considering evidence would conclude was unreasonable. At any rate the carriers refused to comply with the law and to make even a prima facie showing, and thereby unless the lack of evidence was in some way supplied by the action of somebody else the carriers themselves made it impossible that the commissions should grant the increases which they claimed to want and, in a pro forma way but not in compliance with the law, did apply for to the State commissions.

They claimed that they were exempt from the requirement of the law to justify their increases, and that the State commissions must permit as to State rates the identical increase allowed as to interstate rates without proof or consideration of the necessity or reasonableness of such increase. In these two States the carriers themselves, therefore, made impossible the allowance of the advances they sought.

I come now to state what advances the State commissions allowed.

STATE FREIGHT RATE ADVANCES.

First, as to freight rates, the percentages allowed by the Federal Government were allowed in every State in the eastern district except Indiana and Illinois, where the commissions allowed, instead of 40 per cent, 33⅓ and 35 per cent, respectively.

In the southern district the 25 per cent advance was allowed in every State.

In the western district the 35 per cent advance was allowed by every State except North Dakota, and I have explained what the situation was there, and Kansas, Nebraska, and Texas, which States allowed, respectively, 30, 35, and 33⅓ per cent. I will make more particular mention of these cases a little later, and a particular statement will be presented as to one of these.

In the Mountain-Pacific group the full 25 per cent was allowed in every State except the two where the carriers refused to comply with State law, by making a prima facie showing of necessity.

STATE PASSENGER RATE ADVANCES.

As to passenger rates, except in the two States of Arizona and Nevada, the advances asked for were allowed in every State where there were not passenger-fare statutes except three, which I will mention more particularly later.

EXCEPTIONS AS TO CERTAIN COMMODITY RATES.

What I have said with respect to freight rates is subject to the qualification that in various States exceptions were made as to certain commodities according to the necessities of the local situation as found by the commission. The great body of intrastate freight rates, however, was advanced the same percentage as interstate rates hal been, with the exceptions noted.

Except in Kansas the results which I have stated were accomplished within two months from the time when the Federal commission made its decision in ex parte 74, a record which I think you will consider nothing less than phenomenal.

COMPILATION SHOWING RATE ADVANCES GRANTED BY STATE COMMISSIONS.

For the purpose of showing how generously the carriers were treated by the State commissions, I offer a tabulated statement which shows the action of each commission.

(The tabulation referred to is here printed in full, as follows:)

Tabulation showing action of State regulatory commissions on carriers' applications for rate advances since Aug. 1, 1920.

State.	Percentage increase allowed in freight rates.	Exceptions to straight percentage.	Percentage increase allowed in passenger rates.	Exceptions to straight percentage.	Pullman surcharge.	Percentage increase allowed in baggage rates.	Percentage increase in rates on milk and cream.
Alabama	Same as I. C. C.	No increase on ore and limestone	Same as I. C. C.		Denied	Same as I. C. C.	Same as I. C. C.
Arkansas	do	No increase on sand, gravel, and stone for road building.	Statutory		Same as I. C. C.	Statutory	Do.
Arizona [1]	Denied		Denied		Denied	Denied	Denied.
California	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Colorado	do	Denver & Salt Lake authorized to increase fares in Mountain Pacific 35 per cent instead of 25 per cent.	do		do	do	Denied.
Connecticut [2]	do		do		do	do	Same as I. C. C.
Delaware [3]	do		do		do	do	Do.
Florida	do	Increase computed on Federal control rates until Oct. 1; after that date on June 24, 1918, rates plus 25 per cent and subject to Florida classification and rules of that date.	do		do	do	Do.
Georgia	do	No increase on brick, cotton, and cotton linters.	do	No increase to be made above 5 cents per mile.	do	do	Do.
Idaho	do		do	No increase to be made above 3.6 cents per mile.	do	do	Do.
Illinois [4]	35 per cent plus.		Statutory		Denied as within statute.	do	Denied.
Indiana	33⅓ per cent.	No increase on brick and burnt clay. Commodities generally increased 10 per cent except iron and steel, 16 per cent. Rates on coal from gas belt not to exceed Indianapolis rate by more than 25 cents per ton. Rates on coal from mines, maximum rate per ton, 55 cents for 10 miles or less; 65 cents, 10 to 30 miles; Brazil, Clinton, and Linter districts to Terre Haute, 65 cents. Maximum switching rate on coal, $10 per car. Sliding scale of maximum carload rates on straw from 6¼ cents per hundredweight to 16 cents.	Denied		Denied	Denied	Do.
Iowa	Same as I. C. C.		Statutory		Statutory	Same as I. C. C.	Same as I. C. C.

Kansas	30 instead of 35 per cent, I.C.C.	Brick increased 1 cent per 100 pounds; cement, 2 cents; crushed stone, sand, and gravel, ½ cent; coal sliding scale advance 15 cents to 40 cents per net ton. No increase on petroleum and its products.	Denied		Same as I. C. C.	Denied	Denied.
Kentucky [6]	Same as I. C. C.		Same as I. C. C.		do	Same as I. C. C.	Same as I. C. C.
Louisiana	do	Sand, gravel, crushed stone, shells, etc., for road building not increased. Advances on cotton contingent on allowances being made compresses as now provided for compressing cotton in transit not less than 20 cents per hundredweight. Advances on rough and clean rice and sugar cane withheld pending further hearing.	Denied		Denied	do	Advance withheld pending further hearing.
Maine	do		Same as I. C. C.		Same as I. C. C.	do	Same as I. C. C.
Maryland	do		do		do	do	Do.
Massachusetts	do		do		do	do	Do.
Michigan [5]	do		Statutory		Denied as within statute.	do	Do.
Minnesota	do		do		Same as I. C. C.	Denied as dependent on passenger fares.	Do.
Mississippi	do		Same as I. C. C.		do	Same as I. C. C.	Do.
Missouri	do	Increase on coal, coke, brick, etc., sand, gravel, stone (except carved, etc.), crushed rock, chat, cinders, lime, cement, plaster, etc., petroleum and its products which will result in rates more than 70 per cent above rates in effect June 24, 1918, withheld pending investigation.	do		do	do	Do.
Montana	do		Statutory		Denied	Denied	Denied.
Nebraska	25 per cent instead of 35 per cent, I. C. C.	No increase on brick and hollow tile. Rates on carload shipments of crushed rock, sand, and gravel not to exceed 160 per cent of rates in effect June 24, 1918.	do	20 per cent increase on extra-fare trains and for special trains.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.

[1] Carriers refused to offer evidence to justify increases asked, as required by State law, claiming I. C. C. order obligated the State commission to grant identical increases.
[2] Without commission action.
[3] Delaware has no commission.
[4] Illinois is partly in eastern, partly in southern, and partly in western territory. I. C. C. advances 40 per cent eastern, 35 per cent western, and 25 per cent southern. The increase permitted by Illinois was not a flat percentage but upon rate schedules estimated by the Illinois commission to yield over 35 per cent increase.
[5] Without commission action.

Tabulation showing action of State regulatory commissions on carriers' applications for rate advances since Aug. 1, 1920—Continued.

State.	Percentage increase allowed in freight rates.	Exceptions to straight percentage.	Percentage increase allowed in passenger rates.	Exceptions to straight percentage.	Pullman surcharge.	Percentage increase allowed in baggage rates.	Percentage increase in rates on milk and cream.
Nevada	Denied		Denied		Denied	Denied	Denied.
New Hampshire	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
New Jersey	do	No increase on sand, gravel, and broken stone for road building.	do		do	do	Do.
New Mexico	do	No increase on carload coal between Carthage and San Antonio and on low-grade ore between Santa Rita and Hurley and on logs in carloads from Thorean to Albuquerque.	do	No increase in fares already on basis of 4 cents per mile.	do	do	Do.
New York (first district)	do		Statutory		Denied as within statute.	Denied	Denied.
New York (second district).	do		do		do	do	Do.
North Carolina	do		do		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
North Dakota	Denied		Denied		Denied	Denied	Denied.
Ohio	Same as I. C. C.		Statutory		Denied as within statute.	do	Do.
Oklahoma	do		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Oregon	do		do		do	do	Do.
Pennsylvania	do		do		do	do	Do.
Rhode Island	do		do		do	do	Do.
South Carolina	do	Switching charges in connection with intrastate line hauls are limited by statute.	Statutory		do	do	Do.
South Dakota	do	Tentative scales of class rates fixed applicable to traffic between stations on lines west of the Missouri River on the one hand and stations west. Also tentative maximum scales on the following commodities in carloads: Grain and grain products, hay and straw, live stock, lignite, emigrant movables, fuel wood, sawdust and shavings, gravel, sand, and stone, broken, crushed, and ground. In some instances these scales permit advances of 35 per cent above rates in effect at end of Federal control. Investigation by State commission is proceeding for	Same as I. C. C.		do	do	Do.

		the purpose of fixing these excepted rates on a uniform basis with interstate rates.					
Tennessee	do	No increases on carload shipments of sewer pipe, and road-building material.			do	do	Do.
Texas	33⅓ per cent.[7]		Statutory		Covered by statute	do	Not acted on.
Utah	Same as I. C. C.	No increase on coal and ore	Same as I. C. C.	No increase above 3.6 cents per mile.	Same as I. C. C.	do	Same as I. C. C.
Vermont	do		do		do	do	Do.
Virginia	do		do		do	do	Do.
Washington	do	Increase on pulp logs suspended pending further investigation.	do	No increase in fares already 3.6 cents per mile.	do	do	Denied.
Wisconsin	do	No increase in rates authorized by commission June 2, 1920, on Marinette, Tomahawk & W. R. R. because larger increase before granted.	Statutory	20 per cent increase on commutation but subject to statutory limit.	Under consideration.	Carriers allowed to file tariffs increasing rates subject to later approval.	Same as I. C. C.
West Virginia	do		Same as I. C. C.	No increase in fares, now 4 cents.	Same as I. C. C.	Same as I. C. C.	Do.
Wyoming	do		do		do	do	Do.

[6] Carriers refused to offer evidence of necessity for increases asked, as required by State law, making the claim that I. C. C. order obligated the State commission to make identical increases.

[7] Instead of 35 per cent allowed by I. C. C.

The CHAIRMAN. Were the advances made by the State commissions at the request of the Interstate Commerce Commission, or what sort of communication was had between the Interstate Commerce Commission and State commissions that resulted in those advances?

Mr. BENTON. The carriers, after the decision in Ex Parte 74, proceeded in each State to file tariffs or to ask leave to file tariffs, in accordance with the laws of the respective States. Hearings were set and action was taken in regular form.

The statement as to the participation of members of the National Association of Railway and Utilities Commissioners, which I put into the record on yesterday, will show that under an arrangement made by the association the entire record in Ex Parte 74 was supplied to each State commission. Under explicit understanding had the National Association did not undertake to say whether that record would be introducible evidence under the law of a particular State or not; it was supplied for the information of the members of the State commissions for such use as the State commissions might see fit to make of it. I am not aware of the fact that in a single State were the carriers refused permission to introduce that entire record in the State proceedings for the purpose of facilitating the rate inquiries and the granting at the earliest practicable date of such advances as might be found to be necessary on intrastate rates. Obviously, unless that arrangement had been made, and unless the State commissions had desired to recognize to the fullest extent that justice required the situation then existing be met as promptly as they could, hearings could not have been set and held and decisions reached and orders made throughout this country within two months.

It has been sought to create in the public mind the idea that it was necessary for the Federal Government to step into the States and take away the power of State regulation which the States have had since the formation of this Government on account of unwillingness on the part of State commissions to recognize the situation and to do what justice and fairness required. Nothing could be more false nor farther from the exact state of affairs. And I want to say that this tabulation which I have put into the record, and the time within which those results were obtained, refutes that claim more conclusively than any words of mine or of anybody else could do, because no man who is at all familiar with the length of time that proceedings ordinarily take before State commissions, to say nothing of the time that is required to carry through proceedings had before the Interstate Commerce Commission, which is so much more burdened than the State commissions are, can fail to understand the significance of the record which these State commissions made following the Ex Parte 74 hearings.

A member of this honorable committee (Senator Townsend) on yesterday asked me whether the State commissions, in their actions, considered only the situation within their own States, and I said that I proposed to touch upon that subject later. I am now touching upon it. The spirit with which the State commissions, in common meetings, provided for informing themselves quickly with respect to the situation, and of acting quickly upon applications made in their respective States, and the celerity with which they did act, prove, I say, as conclusively as it is possible to prove anything, that the State commissions of this country recognized the responsibility which attached to their offices, and viewed not alone the situation in their own States but the situation throughout the country.

The CHAIRMAN. You are speaking now of freight rates, of course?

Mr. BENTON. I am speaking of all rates, both passenger and freight, and I am about to speak of passenger rates in particular.

The CHAIRMAN. Of course, there are some States in which passenger rates are fixed by statute.

Mr. BENTON. I am coming to that, Mr. Chairman.

The CHAIRMAN. If I understand your statement correctly, it is that in every State, save four, the State commisisons advanced rates in the same percentage in which rates had been advanced by the Interstate Commerce Commission in the matter of interstate business?

Mr. BENTON. Yes; with the exceptions I have mentioned. I have mentioned, for instance, Indiana, which advanced rates 33⅓ per cent; Illinois, 35 per cent; Kansas, 30 per cent; Nebraska, 25 per cent; and Texas, 33⅓ per cent instead of 35 per cent.

The CHAIRMAN. That is substantially the same advance as made by the Interstate Commerce Commission in the matter of interstate rates?

Mr. BENTON. That is true, Mr. Chairman. Then, there were certain commodities which, as I have stated, the State commissions investigated and found that modifications were necessary, and in order that the traffic might move they made the modifications. The wiping out of those modifications I propose to refer to in a moment.

PASSENGER RATES FIXED BY CONGRESS.

An examination of this tabulation shows that, with the exceptions before mentioned, the passenger fares were raised in the nonstatutory passenger fare States. There were, however, a number of States where the commissions had not been granted passenger-fare jurisdiction, such rates having been regulated by statute.

When it passed the transportation act, Congress knew that passenger rates had varied in different States in the past and might vary in the future. It knew of the passenger-fare statutes. It, however, took care of the problem they presented by the provisions of section 208(a) of the transportation act. In that section Congress exercised its war power to free the roads, to the extent it judged wise, from the statutes. It provided therein that the Director General's rates, both State and Federal, should continue absolutely in effect during the period of Federal control (unless changed by consent of the Federal commission) "and until thereafter changed by State or Federal authority, respectively."

The validity of this section as an exercise of the war power has been upheld by State and Federal courts: Public Service Commission of New York *v.* New York Central Railroad (New York Court of Appeals, decided Dec. 16, 1920); Michigan Central Railroad *v.* Michigan Public Utilities Commission (U. S. District Court, Eastern District of Michigan, decided Jan. 24, 1921).

Under Federal control the passenger fares in all States were, therefore, continued in effect on a basis of not less than 3 cents per mile. On many lines there were rates very substantially exceeding 3 cents. All the Director General's rates continued after the termination of Federal control, State rates as well as interstate rates, except as they were increased in most of the States immediately after the Ex Parte 74 decision, as has been stated, and as will be shown by the tabulation. Nowhere did any State exercise the power which Congress clearly recognized in section 208(a) to reduce passenger rates after September 1, 1920, although in a single instance a single road was asked to observe a charter contract. A particular statement with respect to that, as I have stated, will be made by Judge Hale, representing the Public Service Commission of New York, and refers to the New York Central Railroad.

ADVANCES COMPELLED IN STATE PASSENGER FARES NOT BENEFICIAL TO RAILROADS.

I now want to make the statement as emphatically as I can that in my humble judgment it would have been better for the country and better for the carriers if the Federal commission had left in effect the passenger rates which Congress fixed. Three cents is about as high a passenger fare as will permit a maximum flow of passenger traffic, and it is from full cars that the railroads make their net earnings or profits.

When the Federal commission and most of the State commissions allowed the 3-cent rate to be advanced to a minimum of 3.6 cents passenger traffic dried up. This is a matter of common knowledge.

Senator STANLEY. Will you permit an interruption right there?

Mr. BENTON. Certainly.

Senator STANLEY. I endeavored to get from the Interstate Commerce Commission some statement as to the effect on passenger traffic of the increased rates, especially on the use of sleeping cars, and I refer more especially to the later increase or surcharge. If an explanation has been incorporated in the record, I did not hear it, but I have been anxious to find out what has been the effect of this last charge of "time and a half and double time," as I might call it, put upon the traveling public when using the sleeping cars. I have had occasion recently to go west on one line and back on another, and on one line I had a whole car to myself with the exception of one other passenger to keep me company. On several other lines I noted this same falling off. I talked with Pullman car conductors about it, and they said they had noticed it, but I have never been able to get any official figures. My private opinion, publicly expressed, is that this last rate

imposed on passenger traffic has destroyed the end for which it was designed; it has decreased the traffic to a greater extent than it has increased the revenues of the railroads.

The CHAIRMAN. You mean the surcharge that goes to the railroads themselves?

Senator STANLEY. Yes; that increase goes to the railroads and not to the Pullman Co.

Mr. BENTON. All of the increase goes to the railroads.

Senator STANLEY. But no matter who it goes to, the question to my mind is whether this last increase in rate has not driven people from Pullman cars to the extent as to absolutely lessen the earnings of the railroads. It has played hob with the commercial traveler, and it is driving actors and opera troups almost entirely from the railroads because prices are prohibitive. I know what the public has suffered, and I think the railroads are suffering lessened earnings along with us who have to pay more for the service.

Mr. BENTON. As to the last Pullman increase, to which I understand you to refer, the imposition by the Federal commission of a Pullman surcharge of 50 per cent, it goes for the benefit of the railroad carriers.

Senator STANLEY. Yes; that is what I referred to.

Mr. BENTON. But the first increase which you referred to I assume to have been the increase which was allowed for the benefit of the Pullman Co. itself?

Senator STANLEY. Yes.

Mr. BENTON. What the Senator from Kentucky (Mr. Stanley) wants and what I wish I could give him is exact data, figures, covering that subject. Those I can not give him, but I feel certain that if he will make request to the Interstate Commerce Commission they can be compiled and supplied to him.

Senator STANLEY. I am not criticizing the Interstate Commerce Commission.

Mr. BENTON. I understand. And I feel certain you will get that information. Of course it takes time in any organization to compile data of that sort. Ultimately the Senator from Kentucky(Mr. Stanley) undoubtedly will get that information.

I can only now express what my information is, as received from commissioners with whom I have talked. The information universally received from them is that the Pullman surcharge has been very destructive of travel upon Pullman cars. That accords with my own personal observation; in fact, since that surcharge went into effect the travel on Pullman cars has almost disappeared on many trains.

I came, a few weeks ago, from Chicago on one of the trunk lines, and from Chicago to Washington it is my recollection that there were only two people in the Pullman car besides myself. That is an experience of my own, as called for by the question of the Senator with respect to the effect on Pullman travel of the last increase.

Senator STANLEY. I do not mean to criticise the Interstate Commerce Commission. They are usually very gracious and diligent in furnishing information, or especially that has been my experience, as requested by Members of the Senate. The question I asked may have been answered in these hearings, but I have not got the information. I thoroughly understand the effect of this last surcharge upon the business heretofore handled in Pullman cars; and in addition to its effect upon those who would otherwise travel is the great consideration, its effect upon the earnings of the railroads themselves. I can not help but doubt whether the railroads have not placed on the traffic more than it will bear and thereby lessened their own income, for they seem to have destroyed, or practically destroyed, the greater part of this character of business.

Mr. BENTON. I agree with what I take to be implied in the Senator's remark—that it must entail a loss upon the rail carriers to impose so high a Pullman charge that they drive passengers from the Pullman cars, and, accordingly, are obliged to haul empty Pullman cars.

President JACKSON, of the National Association of Railway and Utilities Commissioners. I may say that I have personal knowledge of one or two railroads—and I do not care to name them in the record, but they are big railroads in the United States—and I do not think the officers of those railroads desired the increase in pasenger fares to which reference has just been made.

Senator FERNALD. That increase, of course, was authorized by the Interstate Commrce Commission, I take it.

Mr. JACKSON. Yes, sir.

The CHAIRMAN. It would depend somewhat, would it not, upon how many passengers ceased to travel and how many passengers were driven from Pull-

man cars into day coaches, as to the situation which you mentioned, Mr. Benton?

Mr. BENTON. Of course, if the expense incident to hauling the Pullman car ceased when Pullman passengers went into the day coach, there would be no loss to the carrier. But if the carrier is obliged to haul a heavy Pullman car from Chicago to Washington, or from Chicago to New York, with only three passengers in it, that railroad can scarcely say that it has lost nothing because the pasengers rode in day coaches if it had to provide the necessary day coaches for them to ride in.

The CHAIRMAN. One would think under those circumstances a railroad would not carry any more Pullman cars than was necessary to handle the pasengers actually traveling.

Mr. BENTON. You are now getting upon a subject I can not answer because I do not know about the contracts between the Pullman Co. and the carriers And, further, an answer to that question would depend upon whether the public would permit an entire cessation of Pullman service on important trains.

The CHAIRMAN. It is not that, but there is no contract between the Pullman Co. and the railroad companies requiring them to haul a particular number of Pullman cars over any particular road, is there?

Mr. BENTON. As I was stating, I have no information on that subject.

The CHAIRMAN. If there is no contract between the Pullman Co. and the railroad companies requiring them to haul any particular number of Pullman cars over any particular road, a railroad could reduce the number of cars hauled according to the amount of travel.

Mr. BENTON. I do not know whether there is such a contract or not. I have never examined the contracts.

Senator STANLEY. At that point there is one phase of the situation that affects the public very materially: I understand that traveling men who formerly utilized sleeping cars in making long runs now stop at hotels along the route at night where they can stay for a couple of dollars and have quit using Pullman cars. The necessary result of that is that their efficiency is very much impaired, and the cost of the service rendered by these commercial travelers is increased, and that increased cost is added to the many burdens passed on the ultimate consumer.

Mr. JACKSON. I was going to call attention, if I may, to the fact that a great many trains have to be run anyway, whether they carry any passengers at all. In other words, a certain amount, a minimum service, has to be rendered the public. If those trains have to be run anyway, they are better off to carry five passengers at 3 cents a mile than four passengers at 3.6 cents a mile.

The CHAIRMAN. I would assume that if regularly or habitually there were only two or three passengers on a Pullman car making the trip from Chicago to Washington or New York that a railroad would cut down the number of Pullman cars handled. But, of course, that might be a great inconvenience to the public at one time and another.

Mr. JACKSON. I might add that I do not think the railroads are carrying anywhere near the number of Pullman cars they were hauling.

Mr. CLYDE M. REED, chairman of the Public Utilities Commission of Kansas. It may be interesting at this point to put into the record some figures bearing upon the statement Mr. Benton has made and concerning which the members of the committee have asked. Passenger-train operation has a direct relation, of course, to the number of cars run; and revenue has a direct relation to the number of passengers handled per car. In a statement which has just been issued by the Interstate Commerce Commission covering revenue traffic statistics of Class I railroads in the United States it is shown that for the first seven months of 1920 the average number of passengers handled per car was 22.12.

The CHAIRMAN. That is, handled on all cars?

Mr. REED. Yes, sir; that covers all cars handled. And the average number of passengers per car for the first seven months of 1921 was 17.15, showing that not only has travel decreased but the number of passengers per car has decreased, which I think covers the point mentioned by Mr. Benton.

Senator STANLEY. My question was especially directed to the number of passengers handled on Pullman cars.

The CHAIRMAN. That shows the diminution in travel, and I suppose it shows a reduction in business handled beyond the capacity of the railroads to shrink their operating expenses.

Senator POINDEXTER. That, as I understand, covers the number of passengers handled on all cars.

Mr. REED. Yes, sir. No separate statistics are made by the Interstate Commerce Commission.

Senator POINDEXTER. And from it you could not make any deduction as to the Pullman-car decreases?

Mr. REED. Our statement was directed more to the effect that this passenger rate was having—to the fact that the rate was, economically speaking, too high. But your point is well taken.

Senator STANLEY. Does the Interstate Commerce Commission keep a separate record of the Pullman-car traffic from the traffic handled in day coaches?

Mr. REED. There are no Interstate Commerce Commission statistics, so far as we know, on that subject. Some railroads have those statistics separately, and perhaps all railroads have them, but there are no Interstate Commerce Commission statistics with which I am familiar that cover that information.

The CHAIRMAN. It would seem to indicate inefficiency on the part of the management of railroads if such information is not kept by them.

Mr. BENTON. Mr. Chairman, the figures which have just been read into the record by Judge Reed are striking. The question arises, What causes diminution in travel? Nobody will suggest that it was entirely caused by the increase in passenger fares. Nobody I think will suggest that the increase in passenger fares did not have a very large effect in producing this result, however; and, for the reason I have just mentioned, that 3 cents is about as high a rate as will permit of a maximum flow of travel; as will permit a man to go when he does not actually have to go; that will permit a man to take his wife when he would like to take her; that will permit a man to visit in a distant city when he can refrain from making the trip. The quantity of passenger travel which is subject to control by the mere disposition of the people who travel is tremendous. There is a certain amount of passenger traffic which must move and that does move; but that great amount of passenger traffic which is voluntary may be diminished, and very greatly diminished, by the imposition of an unduly high rate.

When the Interstate Commerce Commission and the most of the State commissions allowed the 3-cent rate to be advanced to a minimum of 3.6 cents, and allowed a 20 per cent advance in the higher rates, which ran up as high as 6 cents and 8 cents per mile on branch lines in some States, the passenger traffic dried up. That is a matter of common knowledge.

Senator POINDEXTER. Were those 6-cent and 8-cent rates made by State commissions?

Mr. BENTON. The 6-cent and 8-cent rates I speak of were not usual rates, but rates in excess of 3.6 cents per mile were common in different States on branch lines. They were rates which had been permitted by the State where in effect, and those rates have now come to be advanced 20 per cent under the orders of the Interstate Commerce Commission.

Senator STANLEY. Do I understand you to say that rates beyond the 3.6 cents per mile are made only on branch lines?

Mr. BENTON. Oh, no. I am speaking of rates running up as high as 4 cents and 5 cents and even 6 cents and 8 cents per mile. On main lines in the country, as will appear later from what I say and from what others will tell you, the rates were, however, as high as 4 cents a mile.

Senator STANLEY. On main lines of railroads?

Mr. BENTON. Yes, sir.

Senator STANLEY. And I have paid it.

Mr. BENTON. When upon investigation and consideration the State commission has said: This is all the traffic is worth and all the traffic will bear, all that the public ought to be asked to pay, and declined to allow it to be advanced to 4.8 cents, the Federal Government, through the Interstate Commerce Commission, stepped in and ordered the advance. I say it is common knowledge that passenger traffic began to dry up when that happened. Of course, my assertion on that is worth nothing unless it accords with what Senators themselves know.

Accordingly, I assert that when passenger rates in some States remained on a basis of 3 cents as a minimum, they remained where Congress fixed them, and doubtless expected that they would remain, and where it would have been better for the roads themselves if they had remained; and that the advances in these rates which have been compelled by the Federal commission have been hurtful rather than helpful.

Senator STANLEY. You speak of the inconvenience caused the general public by the inability of a man to take his wife on an unnecessary but enjoyable

excursion. It seems to me that is the lesser of the two objections to these rates. A great many passenger rates are as much a tax upon the public as a rate upon lumber or upon salt or upon wheat. Traveling men and others who are bound to use the railroads in the discharge of their business charge up their traveling expenses to that business, and that charge is reflected in the cost of the article they sell. The public pays the passenger fare of the shoe drummer just as essentially as it pays the freight upon the hides from which the shoes are made; and these excessive rates charged to traveling men, to members of theatrical companies, and others, engaged in furnishing the necessities of life or the pleasures of life, are a tax upon the general public. And, I might add, there has been introduced a bill to give 1,000-mile rates to traveling men, which I am very anxious to see considered.

Mr. BENTON. I entirely agree with the observations which the Senator has made. I would point out, however, that I was approaching this subject from another angle. I was not citing the class of cases he refers to as a reason for changing the law, or the need for having a lower rate because the public is deprived of the pleasures the people ought to enjoy. I was citing the situation as a reason why, in a way, this high rate works out so as to be hurtful to the carriers themselves. They are losing traffic which they need to fill their cars and enable them to make a net; and when the high rate is put in effect all that is driven away, because it is unnecessary, the class of business the Senator from Kentucky refers to—this voluntary traffic may go or may not, and the high rate is driving it away, and the carriers, instead of being helped by the high rate have been hurt by it. That is the point I am seeking to make.

Senator STANLEY. I am under the impression that they have not only driven away the voluntary traffic, but, to a great extent, the involuntary traffic. In other words, there are thousands of traveling men who are utilizing the wayside inn and the automobile that do normally and would now utilize the railroads if conditions were different. Do you know about that?

Mr. BENTON. That is in accordance with my personal observation, and it is in accordance with what has been said to me by commissioners. For example, the New England railroads are in an exceedingly bad condition. There is no commission in New England which has not done everything it could do to promote their fortunes, to get them on a good financial basis. The tabulation I have put in shows that in every one of the New England States every advance they asked for was allowed. The chairman of the Public Service Commission of New Hampshire was in my office some months after those advances took effect. He told me that he thought the passenger advance had been hurtful rather than helpful; he said it had got to the point where if a man in Rochester wanted to go to Concord he looked about to see whether there was somebody else that wanted to go, and they would pick up two or three people and take a Ford automobile and drive across the State to Concord and then drive home again.

That is an illustration of exactly what the Senator from Kentucky suggests—that even where people must travel they find other less expensive means of travel.

Senator PITTMAN. I have been informed by some representatives of State commissions that in various States the commissioners have authority to grant a franchise to automobile companies as common carriers—that is, companies using automobiles for the handling of passengers and freight—and that in many cases those automobiles are paralleling railroads, and the railroads have protested against the granting of franchises, saying it was taking travel away from the railroads and destroying their business. Have you heard any such statements made?

Mr. BENTON. I heard a conversation to that effect in an informal discussion of the jitney situation, which conversation took place in a hotel at Atlanta during our recent convention there. One of the commissioners was calling attention to that aspect of the situation.

Senator PITTMAN. That the rates on the railroads were so high that motor vehicles are run on roads parallel to the railroad lines and furnish service at a lower rate than the railroad rate?

Mr. BENTON. Yes, sir.

Senator STANLEY. I will say for the information of the Senator from Nevada that it is my impression that complaint has been made to the Interstate Commerce Commission in the case of the Cincinnati, New Orleans & Texas Pacific Railroad, which has a line running from Lexington to Nicholsville, a stretch of 12 miles, there being a parallel road over which trucks and jitneys run. I understand the Queen & Crescent line has asked the Interstate Commerce Commission

to increase rates for freight and passenger traffic along that line of road for the reason assigned by the Senator from Nevada.

Mr. BENTON. My next subject is freight rates. The State commissions voluntarily gave the carriers too much in the way of advances rather than too little. With the exceptions mentioned, they gave them all that the Federal commission gave. The Federal commission in its report in Ex Parte 74 said:

"It would be desirable, if it were possible, to determine definitely the commodities which can best bear the burden of increases and the relationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented."

The State commissions were in a better position to determine definitely the commodities which could bear the burden of increase which the Federal commission had said was desirable, for they had to consider only the rates of their respective States, and they were familiar with local conditions and with local rate structures and with the reasons therefor. With this knowledge and upon careful consideration they made the exceptions as to particular commodities shown in the tabulation which I have put in, and modified the general advance as to some excepted commodities so as to enable the same to continue to move.

When the carriers induced the Federal commission to wipe out these exceptions, as they did in large part, they hurt the public and hurt themselves.

STATE RATES INSTITUTED TO DESTROY STATE REGULATION.

I have outlined at considerable length the action of the State commissions, so that you may be able to judge whether the carriers instituted the State rate cases, which resulted in the Federal orders which I have mentioned, because they were driven to do so by a niggardly policy on the part of the State commissions or whether they did so because they thought the time opportune for destroying State regulation.

The fact is, as I think I have shown, that in their orders advancing rates the State commissions erred on the side of too great generosity to the carriers if they erred at all. They allowed practically all the freight rates, and with one or two exceptions all the passenger rate advances, which the Interstate Commerce Commission allowed with the exceptions which I have before mentioned, which are shown in the tabulation put in, and with the exception of the States where the director general's rate of 3 cents remained because the State commissions had no passenger-fare jurisdiction.

Senator POMERENE. I did not hear your first statement. I understand your complaint, then, to be, from what you have just said, with reference to both rates, that both intrastate and interstate rates have been too high; is that your position?

Mr. BENTON. Mr. Chairman, the Senator from Ohio misapprehends the purpose of this part of my statement. The purpose of it is to demonstrate that no occasion existed for an application to the Federal commission or for the Federal commission to stretch its power under the act. My complaint is against the invasion of the powers of the States by the Federal Government through the Interstate Commerce Commission.

Senator POMERENE. I was attracted by your statement to the effect that State commissions had given the same rates as the Interstate Commerce Commission had given, except in a few instances to which you had called attention.

Mr. BENTON. I was making that statement, and the purpose of it was to show you that the Federal Government is under no necessity of ousting the States of their powers of local self-government, which they have been permitted to exercise from the foundation of this Government to the present time. I have heard the argument made that it was necessary for the Congress to withdraw from the States the power of regulation of the internal commerce of the States, and I thought that it would be interesting to the Senators to know, and that the Senators ought to know, that that was not so, and the purpose of this part of my statement is to show that.

The CHAIRMAN. Perhaps, Senator Pomerene, you were not here at the time the witness made a statement and introduced an exhibit which shows that after the Interstate Commerce Commission had decided, or had heard what is known as Ex Parte 74, through which the interstate rates were advanced, that all the State commissions, with only a negligible exception, advanced their State rates in the same proportion.

Mr. BENTON. The exceptions were on commodities where exception had to be made.

Senator POINDEXTER. Let me ask a question there: I understood that you were assuming a moment ago that that not only was injurious to the public but injurious to the railroads; that it tended to decrease the net earnings of the railroads. How do you justify the action of all those State commissions in doing a thing that had that effect?

Mr. BENTON. I attempted to picture the situation exactly as it occurred. It was commonly recognized in 1920 that there ought to be an increase in railroad revenues. The Congress had passed an act providing, in section 13, subdivision 3, for cooperation between State and Federal commissions in considering matters relating to alleged conflicts between State and Federal rates. There was on the part of both the Interstate Commerce Commission and the several State commissions anxiety to give to the carriers as large increases in revenue as they justly ought to have.

The Interstate Commerce Commission made an investigation—necessarily a hurried investigation, but yet an investigation—covering some weeks, and determined to advance interstate rates certain percentages. The Interstate Commerce Commission invited the National Association of Railway and Utilities Commissioners to appoint a committee to sit with them during that hearing. While it was clear that that was not the kind of rate case that the Congress had in mind and had provided for in section 13, subdivision 3, nevertheless the State commissions thought they ought to show that they were sincere in their desire to help meet and remedy the then existing situation. Their representatives sat with the Federal commission, and the three men who were there expressed approval of the advance, as to interstate rates, which the Federal commission made, and they recommended that prompt action be taken by State commissions as to such increases as they found necessary in the State rates.

Now, gentlemen of the committee, the State commissions believed, whether wisely or unwisely, that it was desirable to waive any minor differences of opinion that might exist and to go along in a rather broad way at that time, not seeking to weigh with extreme nicety the advances which should be allowed as to State rates. They held their hearings; and where it was obvious that traffic would be destroyed or business unduly injured by the rates on certain commodities they modified the advances. The number of exceptions and modifications is shown by the tabulation I have put in the record.

You ask me, Senator Poindexter, how I justify the action of the State commissions. I explain it by that statement of the situation, and I justify it by saying that they were actuated by the same disposition which actuated everybody else that had to deal with the situation officially—a desire to deal generously with the carriers.

Senator POINDEXTER. At any rate, what fault there was in the action, whatever criticism may be justly attached to it, equally applies to the State commissions as to the Interstate Commerce Commission, does it not?

Mr. BENTON. I do not think so, Senator. I have not found any fault with the Interstate Commerce Commission for its action in Ex Parte 74. But I do not either at this moment desire to say that I think each State commission was charged with the same degree of responsibility for thoroughness of investigation before it allowed the advance, that the national commission was charged with.

In the first place, the State commissions do not have the facilities for investigation that the Interstate Commerce Commission has. In the second place, the several States of this Union are parts of a whole. When it comes to considering in a broad way the needs of the carriers as to advances, and I think the commissions of the different States are entitled to and justified in attaching very great weight to an opinion which has been reached by the Interstate Commerce Commission after an investigation; that they are not justified in acting upon such an opinion contrary to what they know to be the facts, that they are not justified in allowing an advance, which, after an investigation, they know to be unreasonable, but I think that a finding by the Interstate Commerce Commission under those circumstances is entitled to great weight, and that a State commission is not open to criticism if it assumes that the investigation has been thorough and that the conclusion is a right one.

Senator TOWNSEND. If I understand it you were trying to work in harmony with the Interstate Commerce Commission.

Mr. BENTON. Yes, Senator; and we have put in a statement covering that point, and before I complete my statement I purpose to put in a report of a

committee which shows that ever since the transportation act was passed the State commissions of this country have endeavored to work under the cooperative provisions of section 13, subdivision (3), but they have been disappointed in their attempts, through no fault of theirs.

I was observing that it was in the face of this generous treatment, and in spite of the fact that they had been granted all the advances that were to their profit, and more, that the carriers apparently adopted a deliberate plan to break down State regulation.

They found in the amended Interstate Commerce act a perfect instrument for that purpose if they could induce the Federal commission to accept their interpretation of it.

THE NEW YORK CASE.

The circumstances under which they brought the first State case before the commission show, we believe, beyond any reasonable doubt, the purpose of the proceeding to have been the destruction of State power, and not the securing of the rate advances which were involved in the case. These circumstances ought to be briefly stated.

After the decision in Ex Parte 74 the carriers applied to the public service commissions of New York for authority to file tariffs advancing their rates, both passenger and freight, in the State of New York on short notice, the same percentage that had been approved for interstate rates by the Federal commission.

Under the New York law freight rates were subject to advance under tariffs filed by the carriers without leave. The purpose of the application, so far as those rates were concerned, was to procure authority to file tariffs on short notice. As to passenger fares the statute was different.

Senator POMERENE. Do I understand that the application was made before the Interstate Commerce Commission?

Mr. BENTON. No; the application was under Ex Parte 74 for increases in the State of New York and made directly to the public service commissions of New York.

Senator POMERENE. That is what I did not understand.

Mr. BENTON. I was about to say this was not an application made in good faith, and the carriers purposely refrained from complying with the law.

As to passenger rates, the situation was this: Those rates were fixed as to one line at least by the charter of the line. As to other lines they were either in whole or in part fixed by statute. But the commissions had the authority under the law of New York if they found upon application and proof that the rates in effect were "insufficient to yield reasonable compensation for the service rendered" to authorize an increase in those rates.

The attitude of the New York commission was friendly. They set an early hearing, so that such advances as should be allowed might take effect coincidently with interstate advances. The carriers refused to introduce any evidence and claimed that the State commission had no right to consider the reasonableness of the proposed advances, but must, as to State rates, approve the exact advances which had been approved by the Federal commission as to interstate rates.

The New York commission, in spite of this attitude of the carriers, permitted the filing of freight rate tariffs and permitted the same to take effect, advancing all freight rates in New York 40 per cent. As to passenger rates, however, in a very able opinion, the plain requirement of the New York law, which necessitated a finding by the commission upon evidence offered, was pointed out, and advances in those rates were denied until the law should be complied with.

Senator POMERENE. Do I understand from that statement that there was a difference in the law as it applied to passenger and freight rates?

Mr. BENTON. You are right. As to freight rates, the carriers may initiate an increase by the filing of tariffs, which increase becomes effective after a stated period of notice and without any action by the commissions. As to passenger rates, it was necessary for the carriers to make application and show by evidence that the rates in effect were insufficient to afford reasonable compensation for the service rendered. If the commission upon evidence made that finding, then the commission was authorized to grant the advance.

Senator TOWNSEND. That 40 per cent increase was the same as the increase made by the Interstate Commerce Commission, as I understand?

Mr. BENTON. It was, Senator.

Nobody can read the opinion of the New York commission without noting a clearly implied invitation to comply with the law and receive the advances desired.

It may be observed that the New York law was passed during the administration of Gov. Hughes; that it guards the rights of invested capital more carefully by explicit provisions contained in the law than do statutes in most States. It may also properly be said that the New York commission has always had a reputation for faithfully carrying out the purpose of the law. Nobody, so far as I know, has ever charged it with a niggardly policy toward the public-service corporations subject to its regulation.

The carriers, however, left that friendly tribunal, which had made it clear that the increases desired might easily be obtained by conforming with the simple requirements of the law, and came to Washington and instituted a proceeding under the amended section 13, complaining that by authority of the State of New York they were compelled to maintain within New York rates which were discriminatory against interstate commerce. The commission was asked to make an order advancing all intrastate passenger fares in New York 20 per cent.

When this course was determined upon the carriers knew that they were beginning a litigation which would be prolonged and would find its end only in the United States Supreme Court. They knew that they could more quickly and easily obtain the advances for which they asked from the New York commission. The conclusion is irresistible that their principal purpose was to destroy the power of that commission and of the commissions in other States.

In the proceeding begun before the Federal commission the legal representatives of the State of New York appeared, and pointed out to the commission that no application, such as is required by the New York law, had been made to the New York commission. When I say that I mean no application accompanied by proof as is required by the statute to enable a finding.

The CHAIRMAN. Did the carriers in New York come to the Interstate Commerce Commission and admit that they had not attempted to comply with the laws of New York?

Mr. BENTON. They did, Mr. Chairman. They argued before the Interstate Commerce Commission, as according to my recollection the record will show, that after the passage of the transportation act the public service commissions of New York had no functions to perform with respect to either freight or passenger rates in New York, except to register their approval of the exact percentage of increase which had been allowed as to interstate rates by the Federal commission. And that culminated in the case which has been recently argued here in Washington before the Supreme Court of the United States.

Resuming my statement: Upon this point, Judge Hale, the exceedingly able counsel of the Public Service Commission of New York, in his brief said:

"No application was made to the Public Service Commission under section 49 (1) of the Public Service Commissions Law by the New York Central Railroad or any of the carriers 'that the maximum rates, fares, or charges chargeable by any such * * * railroad * * * corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable.' Is not the New York commission entitled to the presumption that it will deal justly and fairly with the carriers in respect of their obligations under the transportation act of 1920, as well as with all other 'contingencies?'"

That word "contingencies" is quoted and refers to a provision of the New York law which commands the New York commission to make allowance in its rates for contingencies.

I continue to quote from Judge Hale's brief:

"We submit to the sound discretion of the commission that the New York Central Railroad (under whose leadership all the other carriers represented are willing followers) owes to its parent State of New York the duty to seek at home what it claims to be its just due. The principle of Prentis *v.* Atlantic Coast Line, 211 U. S. 210, is as applicable here as in the United States Supreme Court."

That reference is to an opinion of the Supreme Court, wherein the Supreme Court of the United States, having before it a proceeding on rates ordered by the Corporation Commission of Virginia which were under attack, said that while the Federal court had jurisdiction, and it would not dispose of the

case absolutely, it would take no further action until application was made to the Virginia court to correct the order complained of. And I think they were compelled to return to Virginia and to make an appeal to the Virginia Supreme Court, which the law allowed. I have not read that case for many years but that is my recollection about it.

Acting under its interpretat on of the Federal law, however, the Federal commission promptly found that intrastate passenger rates in New York, imposed by authority of the State of New York, were discriminatory against interstate commerce and prescribed a 20 per cent advance in every such rate in the State (except commutation rates, which it reserved for further investigation). It had been pointed out to the commission upon the argument by Judge Hale that many of the intrastate rates in New York were on a higher basis than 3 cents—some upon branch lines even as high as 5 cents—and that the service upon such branch lines was of very different character from the service on trunk lines and of less work, and that the rates in force at the time represented the full value of the service, and were all that the traffic would bear. It was claimed that these rates, at least, could not be claimed to be discriminatory upon any theory; even the fanciful theory that a rate might be discriminatory because it does not yield as much revenue as the carrier thinks he should receive. The Federal commission, however, made short work of that claim. It said in its report:

"The needs of these interstate carriers for revenue to enable them to provide adequate transportat on service and facilities are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges, and rates."

This order of the Federal commission was the first fruit of Federal control by a single board in Washington of all the rates, both interstate and local, in this vast country. In effect the commission said: "It makes no difference that carriers have not presented their application for an increase to the New York commission; and that the New York commission is apparently disposed to receive and to investigate and to act promptly and fairly on such complaint if it is presented as provided by New York law. It makes no difference that we are ourselves without time to make any investigation of the particular rates which are sought to be raised, and that some of those rates, already as high as 5 cents per mile, may be all that the service is worth and all that the traffic will bear. We will, nevertheless, make an order advancing all passenger rates in New York by a flat percentage increase, because we have no time to do otherwise than to deal with them in this wholesale fashion."

Senator FERNALD. Those are the words of the Interstate Commerce Commission?

Mr. BENTON. No; I say this is what they said in effect, being the substance of their decision. What the Interstate Commerce Commission said I read you from the quotation.

Senator FERNALD. I thought you were continuing a quotation from their ruling?

Mr. BENTON. No.

Senator EDGE. That is the argument of the witness.

Mr. BENTON. Yes. I say in effect that is what they said.

Senator PITTMAN. Mr. Chairman, would it not be well to have that whole decision put in the record at the end?

The CHAIRMAN. I think we ought to have the whole report of that case put in the record at this point.

Senator LA FOLLETTE. Yes; and the application in full as made by the railroads to the State commission.

The CHAIRMAN. If you have it, Mr. Benton, or can furnish it, the committee will be glad to have you do so; otherwise we will attempt to get it.

Senator FERNALD. Is it the contention of the witness in arguing on the bill before us that if this matter had been left to the State commissions the advances would have been less in the matter of passenger and freight rates than were made by the Interstate Commerce Commission?

Mr. BENTON. It is my contention that if the State of New York had been permitted to handle this matter, at least as to many of the rates in New York, the advances would not have been so much as they were.

Senator FERNALD. That is your contention?

Mr. BENTON. It is my contention that based on the evidence a less advance would have been allowed.

Senator FERNALD. And that is true of some other States, is it?

Mr. BENTON. Yes, sir.

The CHAIRMAN. After all, the principal question is whether there ought to have been an application made to the New York authorities before the Interstate Commerce Commission acted on the subject.

Mr. BENTON. I think, Mr. Chairman, the contention is that there ought not to be any attempt to withdraw from New York the power which it has always exercised to control its internal commerce; and I am enlarging upon the situation to show that there was no occasion for it; that there was nothing to justify the argument that it needed to be done.

Senator LA FOLLETTE. Mr. Chairman, we meet at 11 o'clock, and, as announced, there are very important matters to be considered, and I take it that we ought to adjourn at this time.

The CHAIRMAN. I think that is a fact.

Mr. BENTON. Now, if I may do so, before I close for the day I want to say that I was about to ask that a report be put in.

From the decision of the full board Commissioner Eastman dissented in a very brief report, in which he said: "There is no basis for belief that the New York commission is disposed to deal other than justly with the carriers." So logically does Commissioner Eastman discuss the transportation act in that report that I desire to incorporate the same in my statement at this point. I had only intended to ask that Commissioner Eastman's statement be incorporated, but in view of what the members of the committee have stated I take it that the whole of this little pamphlet should be put in, and that the portions which I have stricken out with a blue pencil should go in as well.

The CHAIRMAN. Very well. And if you have it I would ask you to put in the application made by the carriers on the Interstate Commerce Commission for the order which followed.

Mr. BENTON. I do not happen to have the application to which you refer, but I doubt very much if it would throw any light on this subject.

[Interstate Commerce Commission.]

No. 11623. In the matter of rates, fares, and charges of the New York Central Railroad Co. and other railroad companies in the State of New York. Submitted October 11, 1920. Decided November 13, 1920.

Certain fares, charges, and rates required by State authority to be maintained by the respondents within the State of New York found to be lower than the corresponding interstate fares, charges, and rates authorized by the order in Ex parte 74, increased rates, 1920 (58 I. C. C., 220), and to be unduly prejudicial to interstate passengers and shippers, unduly preferential of intrastate passengers and shippers, and unjustly discriminatory against commerce.

John E. Benton for National Association of Railway and Utilities Commissioners.

Charles D. Newton and Edward G. Griffin for the State of New York; Ledyard P. Hale and Joseph A. Kellogg for New York State Public Service Commission, second district; Terence Farley for New York State Public Service Commission, first district; Fred W. Putnam for Minnesota Railroad and Warehouse Commission; R. Hudson Burr and James E. Calkins for Railroad Commission of Florida; Morton T. Culver, W. E. Trautmann, A. D. Rodenberg, and H. H. Slater for Illinois Public Utilities Commission; A E. Helm and W. L. Huggins for Court of Industrial Relations, State of Kansas; J. H. Henderson for State of Iowa; Hugh LaMaster for State Railway Commission of Nebraska; Dwight M. Lewis for Board of Railroad Commissioners of Iowa.

John Holley Clark, jr., for Chamber of Commerce of the Borough of Queens; John Adikes for Jamaica Board of Trade.

Alfred P. Thom, Charles C. Paulding, Francis I. Gowen, John C. Bills, W. S. Bronson, Clyde Brown, N. S. Brown, George F. Brownell, E. G. Buckland, and R. V. Fletcher for respondent carriers.

REPORT OF THE COMMISSION.

FORD, commissioner: In pursuance of our findings in Ex parte 74, increased rates, 1920, 58 I. C. C., 220, we authorized within a region that includes the State of New York an increase of 40 per cent in the interstate freight rates; 20 per cent in the interstate passenger fares, baggage charges, and rates on milk and cream; and also a surcharge amounting to 50 per cent of the charge for space in sleeping and parlor cars, to accrue to the rail carriers.

Thereupon the steam railroad companies serving the State of New York made formal application to the public service commission of the State of New York, second district, for permission to file effective on five days' notice, tariff supplements providing increases in the rates, fares, and charges applicable to intrastate traffic in the State of New York corresponding with those authorized in our report. So far as the application related to rates and charges for the transportation of freight except milk it was granted by the public service commission, by an order entered August 19, 1920, and the increases became effective August 26, 1920, contemporaneously with the increases in interstate rates. But so far as it related to passenger fares, sleeping-car and parlor-car fares, baggage charges, and rates on milk and cream, the application was denied by the public service commission. Thereafter the principal steam railroads serving the State of New York filed with us a petition for relief in accordance with the provisions of section 13 of the interstate commerce act. A hearing upon the petition has been held, and the views of parties in interest have been presented to us on brief and by oral argument.

This case raises again the question whether in regulating interstate commerce, under authority reposed in us by Congress, we have incidentally the power of regulating intrastate commerce so far as it affects interstate commerce. In the Shreveport Case (23 I. C. C., 31), we held that we did possess that power by act of Congress, and we pointed out:

"Congress passed this act with full knowledge and profound appreciation of those decisions of the Supreme Court in which it had been held that State commerce was that wholly within a State 'and not affecting interstate commerce,' as is fully shown by the Cullom report of 1886, out of which grew the act to regulate commerce."

The position we took was sustained by the United States Supreme Court, and the principle on which we acted then continues to be our guide. But since then the general obligation resting upon us to exercise control over intrastate commerce so far as it affects interstate commerce has been put in the form of a mandate by section 13 of the interstate commerce act, as amended by the transportation act, 1920.[1]

It has been urged in opposition to the application of this principle to the pending case that such incidental jurisdiction as we may possess over intrastate rates is contingent upon proof that discrimination exists affecting particular persons or localities. But inasmuch as the basis of our jurisdiction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate commerce. It is no answer to this to say that if this conclusion be admitted it may have the effect of completely displacing State jurisdiction over State commerce. There may be cases in which intrastate rates affect interstate commerce injuriously in ways so manifest as to make them subject to our control. There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disre-

[1] SEC. 13 (3). Whenever in any investigation under the provisions of this act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act.

(4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or pracetice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

gard it. But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent. If they do they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a State should be involved.

It has not happened heretofore that we have had occasion to make such an extensive exercise of our authority as is now contemplated, and we could not be moved to do so save by the most cogent reasons. Such reasons have been supplied by the situation in which the transportation interests of the country were placed and the action taken by Congress to relieve that situation.

Our findings in Increased Rates, 1920, supra, were responsive, as the report shows, to legislation enacted by the Congress as part of the tranportation act, 1920, approved February 29, 1920, now incorporated in the interstate commerce act as part of section 15a thereof, paragraphs 2 and 3 reading as follows:

"(2) In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable; and to prescribe different rates for different sections of the country.

"(3) The commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States wth adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of 1 per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the commission, are chargeable to capital account."

In accordance with these statutory provisions we designated four rate groups, one of which embraces the territory bounded on the west by the Mississippi River and on the south by the Ohio River and the main line of the Norfolk & Western Railway; and we authorized increased rates, fares, and charges that were designed to enable the carriers as a whole in that rate group, "under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment," to earn an aggregate annual net railway operating income equal, is nearly as may be, to 5½ per cent upon the aggregate value of the railway property of such carriers in that group, plus one-half of 1 per cent of that aggregate value for improvements, betterments, or equipment, chargeable to capital account.

Congress had taken, as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purposes of our report, we included all the railway property of each carrier held for and used in the service of transportation. This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the States and reposed in us. We find nothing in the law to indicate that such was the intent of Congress. But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of of intrastate revenue and interstate revenue. In The Minnesota Rate Cases (230 U. S., 399) the Supreme Court said:

"This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidently controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

The record shows that the refusal of the State of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,00,000 and $12.000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York.

This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges, and rates. The record shows that the respondent carriers perform the services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the findings hereinafter made. Those findings are without prejudice to the right of the authorities of the State of New York or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act.

PASSENGER FARES.

The record leaves no doubt as to the unduly preferential character of the intrastate fares and charges now in effect in the State of New York. Intrastate passenger fares are, in general, on a basis of 3.6 cents per mile as maximum. Passengers traveling between points in the State of New York and points in other States may be required to pay 3.6 cents per mile, whereas passengers traveling within the State of New York pay only 3 cents per mile. The basis of 3.6 cents applies on intrastate traffic in every State bordering on the State of New York. In other words, intrastate passengers in New York enjoy a basis of fares distinctly lower than those exacted of interstate travelers in the same territory, often riding in the same trains, and also lower than the fares paid by intrastate passengers in neighboring States. The record shows beyond question that there are no transportation conditions in the State of New York that justify lower rates or fares, on the whole, than those applicable in neighboring States, or lower than the interstate rates and fares between points in New York and points in other States.

The situation is well illustrated by the fares between New York City and Buffalo. Of the several available routes connecting these points that over the New York Central is intrastate while the others are interstate. Exclusive of war taxes, it appears that since August 26, 1920, the fare has been $14.27 over the interstate routes and $13.16 over the New York Central, a difference of $1.11 in favor of the passenger using the latter route. In the case of a passenger occupying a lower Pullman berth the difference is increased to $2.36. Moreover, a passenger traveling from New York City to a point west of Buffalo can, by buying a ticket to Buffalo over the New York Central and buying another ticket at Buffalo to his destination, defeat the through interstate fare.

Representatives of the carriers stated that the inevitable result of this situation would be the reduction of the interstate fare from New York to Buffalo to the level of the intrastate fare, and that this would tend to disrupt the entire fabric of the interstate passenger fares in the territory involved.

Inasmuch as the excess-baggage charges are arranged upon a scale bearing a fixed relationship to passanger fares and correspondingly graded in amount, such charges are governed by the passenger fares, and any discrimination in passenger fares would necessarily involve a discrimination in excess-baggage charges. This statement concerning the manner in which the baggage charges are determined is based upon the schedule of rates and charges of the carriers now on file in the commissions' office.

RATES ON MILK AND CREAM.

The expression "milk and cream" as used herein includes milk, cream, skim milk, buttermilk, condensed milk, evaporated milk, and pot cheese, and for the purpose of indicating the effect upon interstate commerce and upon the revenues of carriers, of the discrimination under consideration, we give illustrations, as follows:

The New York Central Railroad Co. operates nine milk trains daily into the New York City district, carrying 1,300,000 quarts of milk and cream, of which approximately 75 per cent is shipped over intrastate routes and approximately 25 per cent over interstate routes.

Nine or ten carloads of milk and cream per day originate on the Ulster & Delaware Railroad, which extends from Kingston, N. Y., northwesterly to Oneonta, 107 miles. The cars are delivered to the New York Central at Kingston and, together with six or seven cars originating on a branch of the latter carrier extending southwesterly from Kingston, are there formed into a milk train which moves to New York over the tracks of the West Shore line. This route runs through a part of the State of New Jersey, the West Shore terminals being at Weehawken, N. J., and is therefore an interstate route. Shipments of milk and cream also originate at points along the east side of the Hudson in territory not far distant from that served by the Ulster & Delaware and move to New York over the intrastate route of the New York Central along the east bank of the Hudson River. On shipments using the interstate route the rates charged are 20 per cent higher than those over the intrastate route, although there is no justification from a transportation viewpoint for a difference in the rates.

Again, a milk train is operated by the Delaware & Hudson Railroad from Eagle Bridge, N. Y., which is northeast of Troy, in a northerly direction, a distance of 52 miles, to Castleton, Vt., thence southwesterly to Troy, N. Y., where it is delivered to the New York Central. Between Eagle Bridge and Castleton this train crosses the State line three times, and again shortly after leaving Castleton for Troy. All shipments received before the last crossing of the State line are interstate shipments, the others intrastate shipments. On milk and cream in this train which happens to cross a State line charges must be paid substantially in excess of those applying on intrastate shipments moving in the same train. There is no doubt that shipments of milk and cream originating in western Vermont and shipped to the New York City district over interstate routes are in direction competition with shipments of the same commodities originating in the eastern part of the State of New York and moving to the New York City district over intrastate routes.

Furthermore, there is a substantial portion of the State of New York, which embraces, generally speaking, the central portion of the State, from which milk and cream may move to the New York City district over either interstate routes or intrastate routes. For the purpose of illustation we may refer to the line of the New York Central extending from Albany to Syracuse with a branch line extending from Syracuse southeasterly to Earlville, and to the line of the Delaware & Hudson from Binghamton to Albany. From this whole territory shipments of milk and cream may move to the New York City district over intrastate routes. From the same general territory, however, shipments may move over the interstate routes of the New York, Ontario, & Western, the Delaware, Lackawanna & Western, and the Lehigh Valley Railroads. Each of these roads has one or more points of contact with the New York Central's main line between Utica and Syracuse and with its branches in that territory. Shipments moving over the interstate routes now pay charges 20 per cent

higher than those charged for shipments from substantially the same territory moving over intrastate routes.

The rates on milk and cream to the New York City district have been considered by us at various times. In Milk and Cream Rates to New York City (45 I. C. C., 412) we found that the interstate rates on this traffic were unreasonable and unduly prejudicial to shippers from near-by points and unduly preferential of shippers from distant points; and we prescribed a scale of mileage rates, in blocks of 10 miles each, or distances up to 630 miles. The prescribed basis was also adopted by the New York Central on intrastate traffic, resulting in a uniform scale of rates over interstate and intrastate routes. By the application of the 20 per cent increase to interstate rates without a corresponding increase in intrastate rates, this uniformity has been destroyed.

COMMUTATION FARES.

The record contains comparatively little evidence on the subject of commutation fares, but so far as it goes it discloses facts in the presence of which we can not presume that the existing rate structure is just and reasonable in its established relationships and that it should be adopted as the basis upon which a general advance should be authorized, as in the foregoing particulars. We shall therefore reserve for future consideration this branch of the case, and as to it we do not now make any finding or enter any order, but we shall keep the case open for further investigation, limited to the subject of commutation fares and commutation baggage charges in the State of New York as to the question whether they cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

FINDINGS.

Subject to the above reservation in the matter of commutation fares and commutation baggage charges, we are of the opinion and find that the increases made by the carriers under Ex parte 74, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and baggage charges for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase the standard intrastate fares and charges correspondingly has resulted in the past and will result in the future: In intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate passenger fares and baggage charges which shall correspond with the increases heretofore made as aforesaid in interstate passenger fares and baggage charges.

We further find that the increases made by the carriers under Ex parte 74, relating to space occupied by passengers in sleeping and parlor cars, result in reasonable charges for the occupancy of such space by passengers traveling in interstate commerce in the territory involved in this proceeding, and that the failure of the carriers within the State of New York to increase correspondingly the charges for like space for passengers traveling in intrastate commerce has resulted in the past and will result in the future: In intrastate charges lower than the corresponding interstate charges; in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States; in udue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate charges which shall correspond with the increases heretofore made as aforesaid in interstate charges.

We further find that the increases made by the carriers under Ex parte 74, relating to rates on milk and cream, and now in effect, result in reasonable rates on milk and cream for interstate transportation within the territory involved in this proceeding, and that the failure of the carriers within the

State of New York to increase the intrastate rates on milk and cream correspondingly has resulted in the past and will result in the future: In intrastate rates lower than the corresponding interstate rates; in undue prejudice to shippers of milk and cream in interstate commerce within the State of New York and between points in the State of New York and points in other States; in undue preference and advantage to shippers of milk and cream in intrastate commerce in New York, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and unjust discrimination should be removed by making increases in said intrastate rates on milk and cream which shall correspond with the increases heretofore made as aforesaid in the rates on milk and cream shipped in interstate commerce.

We further find that, whether the aforesaid passenger fares, baggage charges, surcharges, or rates on milk and cream pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation sevices, in each instance, are performed by the carriers under substantially similar circumstances and conditions.

An appropriate order will be entered.

EASTMAN, commissioner, dissenting: I am unable to join in the decision of the majority, because I believe it goes beyond our lawful power. The objection is more than technical, for it concerns the basic relations between the State and Federal Governments, a matter of great moment.

In essence, the carriers' position is that when we authorize an increase in interstate rates under section 15 (a) of the interstate commerce act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct. State commissions may be asked to authorize the intrastate increases, but they need be offered no evidence except the fact of our decision and have no real discretion. The carriers accept the logical consequence of this view, if I understand them correctly, by holding that applications to the State commissions are in substance a matter of courtesy and that we could, under section 13, either upon complaint or upon our own motion, prescribe the intrastate rates desired even if no such applications had been made. If this be so, it follows that we could practically at will deprive any or all of the States of authority over intrastate rates, for when such rates are once prescribed by our order under section 13 they can not thereafter be changed without our consent.

The record in the instant case is based upon and conforms to this general theory of our power, and it is the only theory, it seems to me, upon which the decision of the majority can in full measure be supported. I am unable to believe that it is sound.

The Supreme Court of the United States has said:

"In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. Illinois Central R. R. *v.* Public Utilities Commission (245 U. S., 493, 510)."

It is in the light of this wise and salutary rule that we should approach the issue before us, construing the provisions of the act with scrupulous respect for State authority. It is, I think, our duty to conclude that when the Congress expects us to exercise new powers at the expense of the States, we shall be told to do so in plain and unmistakable terms.

In defining our jurisdiction, at the very beginning of the interstate commerce act, paragraph 2 of section 1 states that the provisions of the act shall not apply—

"To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

The language is unequivocal, and there is no subsequent provision which runs counter to the limitation. It is interstate and not intrastate transportation with which the act has to do. Under paragraph 4 of section 13 it is true that we may prescribe intrastate rates, but only for the purpose of removing unjust discrimination against interstate commerce. Plainly this power springs from and is merely an incident of the duty to regulate and protect interstate traffic.

Turning to section 15 (a), our duty to establish rates which will enable car-

riers to earn a fair return upon the aggregate value of their railway property relates and is confined to interstate rates. Without regard to the limitation of section 1, there is no "clearly manifested purpose" to extend our authority over intrastate rates, and certainly there is none in view of this limitation. Nor is such a conclusion inconsistent with a reasonable interpretation and practical application of this section. A rule is laid down for our guidance, but our duty is confined to interstate rates, and it is a duty merely to maintain such rates at the level which will yield the return desired, assuming that the States will exercise their own power justly and taking into consideration our right to correct intrastate rates which unjustly discriminate against interstate commerce.

At this point we may consider for a moment whether or not there is reason to believe that the Public Service Commission of New York is disposed to deal justly with the carriers. Following our decision in Increased Rates, 1920, supra, applications were filed with that commission for authority to make like increases in intrastate rates, fares, and charges. With a few minor exceptions the freight increases sought were permitted at once to become effective, as was possible under the State statutes, without indication of approval or disapproval and subject to complaint or investigation in the future. The situation was different as to passenger fares. By a provision of the New York law these are limited to a maximum of 3 cents per mile, but the State commission pointed out that it could permit fares in excess of this limit upon a showing that existing fares were insufficient to afford reasonable compensation for the service rendered. Notwithstanding this intimation, the carriers offered no evidence and did not assert that the fares were insufficient, but relied upon the fact that we had permitted an increase of 20 per cent in the interstate fares. Under the circumstances no course seemed open to the New York commission except to deny the application, and this it did upon the sole ground of lack of evidence.

There is no basis for a belief that the New York commission is disposed to deal other than justly with the carriers, or that it would have been unduly exacting if they had undertaken to show insufficiency of compensation. Upon the facts before us and in a spirit of comity the carriers might well be remitted to the State tribunal to exhaust their remedies before coming to us for action which will deprive the State of all authority over intrastate fares so long as our order remains in effect. In this view of the matter whatever losses in revenue the carriers may have suffered are chargeable to their own default.

But approaching the matter solely from the viewpoint of our own jurisdiction, it is clear, I think, that for such authority as we possess over intrastate rates we must now look to the provisions of section 13. The question at once arises whether by reason of this section we have an essentially different issue before us than has frequently been considered under section 3 of the act to regulate commerce in so-called "Shreveport cases." The carriers assert that the issue is different because section 13 not only prohibits "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," but also prohibits "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Their view, as I understand it, is that the word "discrimination" in this latter phrase is equivalent to the word "burden," and that the effect is to prohibit what was not prohibited by section 3, namely, an unduly low level of rates within the State which is yet not alleged or shown to be unduly preferential of or unduly prejudicial against any particular person or community.

This conclusion I find it difficult to accept. Upon protest the conference committee of the Senate and House of Representatives struck from section 13 the words "undue burden" and wrote in their place the words "undue, unreasonable, or unjust discrimination," which now are there. I hestitate to believe, as the carriers urge that no change in meaning was intended or accomplished by this change in words. Moreover, in speaking of section 3 of the act to regulate commerce in the consideration of the original Shreveport case, the Supreme Court of the United States said:

"It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." (Houston East & West Texas Ry. Co. *v.* United States, 234 U. S., 342, 356.)

Surely this language is quite as broad as the words in section 13 to which our attention is now directed.

If the issue before us is not essentially different from the issue which has been considered in prior "Shreveport cases," it will, I think, be conceded that while the evidence may be sufficient to justify action against certain intrastate fares and charges, it is not sufficient to justify the all-embracing action which the majority approve. This is indicated by the fact that the carriers have not seen fit to rely upon preference to persons or communities, none of which are complaining, but have rested their case chiefly upon the allegation that the intrastate rates are upon a lower level than the interstate and fail to contribute their fair share of the railway operating income to which we have found that the carriers in the eastern group are entitled. For the reasons above stated I doubt our power to change State rates upon this ground. It falls nothing short of an appellate power to substitute our judgment as to the reasonableness of such rates for the judgment of the States. But assuming that we possess this power, is the evidence sufficient to justify us in exercising it?

Stating the question differently, is there evidence that the intrastate fares and charges in question are not producing their fair share of railway operating income and, if they are not, that the percentage increase desired is necessary to bring them to the proper level? That is not, it seems to me, an inevitable conclusion from our decision in Increased Rates, 1920, supra, and in this connection it is desirable to understand clearly the purport and effect of that decision. We were there faced with the necessity of providing without delay the additional revenue needed to bring the aggregate income of the carriers to the level prescribed by the act, and we adopted the expedient of authorizing horizontal prcentage increases in rates, fares, and charges within and between certain territorial groups. This expedient was necessary, for any detailed consideration of individual rates was impracticable in the time available. Nevertheless, it should be noted that the act does not prescribe this method of increasing rates, that our duty under section 15(a) is a continuing duty, and that our finding was only that the method employed would "result in rates not unreasonable in the aggregate." It rested upon the assumption that extensive readjustment would probably be necessary. It is not equivalent to a finding that individual rates, fares, and charges, or classes of rates, fares, and charges, so increased and now in effect, are just and reasonable. Still less does it follow as a necessary conclusion, where State authority is involved, that the passenger fares within any particular State must be increased 20 per cent in order to produce their fair share of railway operating income. But if our decision in Increased Rates, 1920, is not evidence of that fact, certainly there is no other evidence of record upon which such a conclusion can be based.

No doubt it may be unnecessary that the individual fares and charges within the State should all be considered separately or that the value of the property used in the intrastate transportation should be established and the return now earned upon that value estimated by elaborate computations. But I am unable to escape the conclusion that even if the theory of the carriers as to our power under section 13 be accepted, at least it should be shown, by evidence sufficient to justify a valid opinion, that the intrastate fares and charges in question are not now furnishing adequate compensation for the service rendered judged by the standard which the Congress has set forth, and that an increase of 20 per cent is necessary to this end.

Summing the matter up, without going into further detail, I am of the opinion that upon the record before us the decision of the majority involves the exercise of a power which goes beyond any "clearly manifested purpose" of the Congress, and which we ought not to attempt to exercise until it is conferred upon us in plain and unmistakable terms. Nor would such a conclusion leave the carriers without a remedy, if they are prepared to bring the necessary evidence to the attention of the New York commission.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of November, A. D. 1920. No. 11623. In the matter of rates, fares, and charges of the New York Central Railroad Co. and other railroad companies in the State of New York.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the

date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the common carriers who are parties to this proceeding, namely, Skaneateles, Railroad Co.; Norwood & St. Lawrence Railroad Co.; Middletown & Unionville Railroad Co.; Grasse River Railroad Corporation; Dansville & Mount Morris Railroad Co. and A. S. Murray, receiver; Massena Terminal Railroad Co.; Sterling Mountain Railway Co.; West Shore Railroad Co. (the New York Central Railroad Co., lessee); Rutland Railroad Co.; The New York, Chicago & St. Louis Railroad Co.; The New York Central Railroad Co.; The Michigan Central Railroad Co.; Lehigh Valley Railroad Co.; Fulton Chain Railway Co.; The Delaware, Lackawanna & Western Railroad Co.; Boston & Maine Railroad; Boston & Albany Railroad Co. (The New York Central Railroad Co., lessee); The Lehigh & Hudson River Railway Co.; Fonda, Johnstown & Gloversville Railroad Co.; Central New York Southern Railroad Corporation; Buffalo & Susquehanna Railroad Corporation; Arcade & Attica Railroad Corporation; Prattsburgh Railway Corporation; Pere Marquette Railway Co.; Genesee & Wyoming Railroad Co.; New Jersey & New York Railroad Co.; Grand Trunk Railway Co. of Canada; Erie Railroad Co.; Central Vermont Railway Co.; Bath & Hammondsport Railroad Co.; the Staten Island Rapid Transit Railway Co.; Lehigh & New England Railroad Co.; the Baltimore & Ohio Railroad Co.; the Pennsylvania Railroad Co.; the Long Island Railroad Co.; the New York, New Haven & Hartford Railroad Co.; Buffalo, Rochester & Pittsburgh Railway Co.; Adirondack & St. Lawrence Railroad Co.; the Ulster & Delaware Railroad Co.; Niagara Junction Railway Co.; New York, Ontario & Western Railway Co.; Unadilla Valley Railway Co.; the Pittsburgh, Shawmut & Northern Railroad Co. and F. S. Smith, receiver; Marcellus & Otisco Lake Railway Co.; Lake Champlain & Moriah Railroad Co.; Delaware & Northern Railroad Co.; Wabash Railway Co.; Napierville Junction Railway Co.; Greenwich & Johnsonville Railway Co.; the Delaware & Hudson Co.; the Central Railroad Co. of New Jersey; the Lowville & Beaver River Railroad Co.; New York & Pennsylvania Railway Co.; Catskill Mountain Railroad Corporation; Central New England Railway Co.; Deer River Railroad Co.; Dexter & Northern Railroad Co.; Glenfield & Western Railroad Co.; Marion Railway Corporation; Middleburg & Schoharie Railroad Co.; New York Connecting Railroad Co.; Raquette Lake Railway Co.; and Schoharie Valley Railway Co., according as they respectively participate in the transportation, be, and there are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination, found in said report to exist, and to establish, put in force, and maintain passenger fares and baggage charges for the transportation of passengers and their baggage in intrastate commerce within the State of New York which shall exceed the fares and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under ex parte 74, referred to in said report, in said carriers' passenger fares and baggage charges for the transportation of passengers and their baggage in interstate commerce within the State of New York and between points in the State of New York and points in other States;

It is further ordered, That said carriers, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain charges for space in sleeping cars and in parlor cars occupied by passengers traveling in intrastate commerce within the State of New York which shall exceed the charges of the carriers now in force and applicable to the occupancy of such space in said transportation in amounts corresponding to the increases heretofore made by the carriers, under an order made by the commission as aforesaid in Ex parte 74, in said carriers' charges for the occupancy of like space in sleeping cars and in parlor cars by passengers traveling in interstate commerce within the State of New York and between points in the State of New York and points in other States;

It is further ordered, That said carriers, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain rates for the transportation of milk and cream in intrastate commerce within the State of New York which shall exceed

the rates of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, under Ex parte 74, in said carriers' rates for the transportation of milk and cream in interstate commerce within the State of New York and between points in the State of New York and points in other States;

It is further ordered, That nothing contained herein shall be construed as either authorizing or requiring said carriers, or any of them, to change in any manner or to any extent the commutation fares, or any of the commutation fares, or charges upon excess baggage carried in connection with any of the commutation fares, of said carriers now in force and applicable to the transportation of passengers or to other transportation in intrastate commerce within the State of New York;

It is further ordered, That this order shall become effective on or before December 18, 1920, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act and remain in force until the further order of the commission in the premises;

And it is further ordered, That a copy of this order be served upon each of the common carriers who are parties to said proceeding.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

The CHAIRMAN. The committee will now take a recess until 9.30 o'clock tomorrow morning.

(Whereupon, at 10 o'clock and 55 minutes a. m., the committee adjourned until Wednesday, October 26, 1921, at 9.30 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

WEDNESDAY, OCTOBER 26, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m. in room 410, Senate Office Building, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. You may resume your statement, Mr. Benton.

STATEMENT OF MR. JOHN E. BENTON—Resumed.

Mr. BENTON. Mr. Chairman and gentlemen of the committee, at the close of the hearing on yesterday I was speaking of the New York order, and I will now continue along that line.

THE CHARACTER OF THE FEDERAL ORDERS.

The character of the order which the Federal commission made in the New York case, and of the other orders which it has made prescribing State rates, ought to be explained.

It is an order which, if valid, absolutely destroys all power of the State over the rates involved until such time as the Federal commission sees fit to revoke its order.

Senator LA FOLLETTE. I would like to get that clear in my mind: Did the railroads apply to the New York commission for an advance in rates?

Mr. BENTON. Yes.

Senator LA FOLLETTE. Did they make formal application?

Mr. BENTON. Yes, Senator, they did. And that application has been telegraphed for and we hope to put it into the record, together with the report filed by the New York commission. In fact, there were two of them. They applied but they did not comply with the law by producing any proof to show that the case fell within the requirements of the New York law, the New York law providing that before allowing an advance as to passenger rates the commission should make an affirmative finding that the existing rates were insufficient to afford reasonable compensation for the service rendered. And it will appear here that the railroads took the position that that provision of the New York law was nullified by the transportation act, and that the New York commission must make the order upon having information supplied to it of the action of the Interstate Commerce Commission in the form of its order as to interstate rates.

The CHAIRMAN. To make that statement complete, under the New York law the railroads had the right to put into effect tariff which increased freight rates, and those tariffs could only be challenged by application being made upon the part of someone who was interested in them. Now, the question I want to ask is this: Did the New York carriers put into effect those advanced rates before they applied to the Interstate Commerce Commission?

Mr. BENTON. As to freight rates they did. You have stated the situation with almost complete accuracy as to freight rates. The New York commission has the power of suspension of freight-rate tariffs, although there are some commissions that may only act upon complaint of shippers of tariffs filed.

Senator LA FOLLETTE. They had the initiative there.

Mr. BENTON. The New York commission may take the initiative and suspend the freight-rate tariffs. But they did not do it. Tariffs were filed and did

take effect, and as to freight rates no order has ever been made by the Interstate Commerce Commission because there was never any occasion for or possibility of such order.

The CHAIRMAN. So that the increased freight rates in New York have been brought about by the carriers themselves, and those freight rates have not been challenged as yet and have not been passed upon by the Interstate Commerce Commission?

Mr. BENTON. That is true. And I should add, for the purpose of making that statement complete, what I said on yesterday, that the New York commission set an early hearing and expedited the taking effect of those tariffs, so that they did take effect the same date as the increase by the Interstate Commerce Commission of interstate rates.

Senator LA FOLLETTE. And we are going to have the records in that case, so that we will get the chronology of the entire proceeding. But to clear up one thing in my mind I want to ask you this: After they filed their new freight rate schedules with the State commission did they then file an application here with the Interstate Commerce Commission for an order advancing those freight rates in New York?

Mr. BENTON. Not as to freight rates; and not as to passenger rates until after the New York reports which will be put in.

The CHAIRMAN. How is it that in the New York case which was submitted to the Supreme Court of the United States a few days ago no question can arise save as to passenger rates?

Mr. BENTON. Well, that case relates purely to passenger rates.

The CHAIRMAN. You say it does?

Mr. BENTON. The case pending in the Supreme Court of the United States does, as you indicate, relate purely to passenger rates.

The CHAIRMAN. That is the way I understood it.

Mr. BENTON. There has never been an order of the Interstate Commerce Commission with respect to intrastate freight rates in New York.

The CHAIRMAN. You may proceed with your statement.

Mr. BENTON. I will say that in section 13 subdivision (4) of the amended interstate commerce act it is provided that whenever the Federal commission prescribes intrastate rates to take the place of rates found discriminatory, the same "shall be observed while in effect * * * the law of any State or the order of any State authority to the contrary notwithstanding."

The words I ask your attention to are that they should be observed "while in effect," assuming the validity of the law relating to application on the part of the carrier to observe rates prescribed by the Federal commission.

I want to couple that up with this statement that whereas formerly orders of the commission prescribing rates were limited in duration to two years, by the transportation act, section 15 was so amended that orders of the commission now "continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

Senator FERNALD. By the Federal commission, that means, of course?

Mr. BENTON. Yes.

Senator LA FOLLETTE. When was that change effected?

Mr. BENTON. That change was effected in the transportation act, Senator.

Senator LA FOLLETTE. Oh, yes, I see.

Mr. BENTON. It may be pointed out that Congress, in section 13 subdivision (4) in granting power to the commission to prescribe intrastate rates, evidently had in mind not entire bodies of rates, but particular rates, for power is granted in the singular, with respect to any "rate, fare, charge, classification, regulation, or practice."

The commission has, however, interpreted the act to give it power to prescribe whole bodies of rates, and in every case where it has prescribed intrastate rates it has provided in the order that the same shall "remain in force until the further order of the commission."

Thus by a single order (it is claimed) a State may be absolutely dispossessed of State power over all rates applicable to its internal traffic, either passenger or freight, or both, for all time, or until such time as the Federal commission sees fit to give that power back. This is the character of order made in the New York case, although the Federal commission in effect in its report admitted that it did not know whether all the rates ought to be advanced as ordered or not. And I again remind the Senators that the commission, in

effect, in its report admitted that it did not know whether all the rates ought to be advanced as ordered or not.

The CHAIRMAN. I desire to say here that I think you are entirely right in regard to the jurisdiction of the commission. The act was not intended, so far as I am concerned, to permit the raising of bodies of rates, but simply for it to take jurisdiction of a particular rate, or of a complaint of a particular rate, and inquire with respect to that rate and its effect as being discriminatory or prejudicial.

Mr. BENTON. I thank you, Senator, for making that statement. I always believed that the interpretation which the Interstate Commerce Commission placed upon the act did violence to the intent of the Congress; but we are disturbed, and the people of our States are suffering on account of the interpretation, and we are especially disturbed because the Federal courts have sustained that interpretation.

THE FEDERAL COMMISSION'S REFUSAL TO COOPERATE, AS PROVIDED IN SECTION 13, SUBDIVISION (3), OF THE AMENDED INTERSTATE COMMERCE ACT.

I have referred to the cooperative provisions of section 13, subdivision (3). It is therein provided that in a proceeding wherein the relationship of State and Federal rates is in question, the Federal commission may cooperate with the State commissions having jurisdiction over such State rates, and to that end is authorized to hold joint conferences and joint hearings. We think Congress introduced those cooperative provisions into the act with the intention that they should be used. We think that there would be few cases of alleged discrimination where such cooperation would not bring about agreement, either to the effect that no discrimination, in fact, exists, or as to the manner in which it should be removed if it should appear upon joint consideration and particular investigation that it does exist. I have already spoken of the disposition of the State commissions and of the participation of members of the national association in the *Ex Parte* 74 advanced rate hearing upon request of the Federal commission, even though it was recognized that that proceeding did not fall within the provisions of section 13, subdivision (3), because it did not involve State rates but merely interstate rate advances.

The New York case, however, was a case of exactly the character wherein cooperation was contemplated by the terms of section 13, subdivision (3). The Federal commission, however, proceeded as if those provisions were not in the act.

And you will remember that I called attention to the appeal made by Judge Hale before the Interstate Commerce Commission.

The CHAIRMAN. The order in the New York case was made after the decision and opinion and order in *Ex Parte* 74?

Mr. BENTON. Yes, sir.

The CHAIRMAN. And at a time when there were no members of any State commission sitting with the Interstate Commerce Commission?

Mr. BENTON. You are right. I will say now what I had planned to say at a later time, that in no single case where allegations have been made to the Interstate Commerce Commission that rates prescribed by a State, or not permitted to be advanced by a State, were discriminatory has the Interstate Commerce Commission afforded a State commission an opportunity to sit with it in joint hearing to consider the fact, or an opportunity to sit down with it in joint conference to discuss those rates and to explain why they were made and what the local situation was which made just and reasonable the rate which the commission of the State had prescribed.

Senator FERNALD. That is a very important statement, and I want to emphasize the first part of it—that in no case, you say, have they met with the State commissions.

Mr. BENTON. In no case involving State rates.

Senator FERNALD. I understand.

Mr. BENTON. I stated, Senator Fernald, perhaps when you were engaged in another hearing, that directly after Congress passed the transportation act the president of the national association waited upon the chairman of the Interstate Commerce Commission and stated the desire of State commissions to fully cooperate under the provisions of the act. And he then said, for I had the privilege of being present, that it was the general desire of State commissions to cooperate with the genuine purpose of making the transportation act successful to the fullest possible extent.

I was asked by some Senator on yesterday how I accounted for the general action of State commissions in permitting rate advances. I made a statement touching that matter, and I desire now to say that they were making the largest efforts which they could make in every State to cooperate in a genuine desire to do what the situation seemed to demand, and in view of that it has been most surprising and disappointing to me that the act has been administered as it has.

I think the matter important, and I desire, in order to complete the record, if I may, to present to be incorporated in the record a report made upon the subject of cooperation to the National Association of Railway and Utilities Commissioners at its convention in Atlanta, of which I have spoken, by a special committee of the association.

The CHAIRMAN. If you will furnish that report to the reporter it may be incorporated in the record.

Mr. BENTON. I would like to hand it to the reporter to be incorporated in the record; and then, if I may, without causing a duplication in the record, read certain portions for the purpose of informing the members of the committee who are here present of the situation. But I would like the entire report to appear in the record. May that be done?

The CHAIRMAN. It may be done.

(The report referred to is here printed in full, as follows:)

REPORT OF SPECIAL COMMITTEE ON COOPERATION OF STATE AND FEDERAL COMMISSIONS.

CONFERENCE WITH FEDERAL COMMISSION AND CORRESPONDENCE RELATING TO COOPERATION.

At the last annual convention of this association this committee was created to confer with the Interstate Commerce Commission on the subject of cooperation of State and Federal commissions. In pursuance of the vote creating the committee, the following communication was addressed to the chairman of the Interstate Commerce Commission:

NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS,
Washington, D. C., December 31, 1920.

Hon. EDGAR E. CLARK,
Chairman Interstate Commerce Commission, Washington, D. C.

DEAR SIR: At the annual convention of this association, held in Washington, D. C., November 9–12, 1920, the following resolution was adopted:

"Whereas, paragraph (3) of section 13 of the interstate commerce act, as amended by the transportation act, 1920, provides in part as follows: 'Whenever in any investigation under the provisions of this act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the commission * * * may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matter wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act;' and

"Whereas said provisions authorizing cooperation were enacted in conformity with recommendations made to the Congress by this association, which recommendations were also in harmony with the recommendations made by the Interstate Commerce Commission; and

"Whereas this association is desirous of doing all that can be done by it to promote genuine cooperation between the State and Federal authorities exercising regulatory jurisdiction over common carriers; and

"Whereas it is the judgment of this association that in order that the maximum benefit may be derived from said cooperative provisions it is desirable that it should be understood in what classes of cases cooperation between State and Federal authorities is deemed feasible by the Interstate Commerce Commission, and with respect to each such class of cases, whether by joint conference or joint hearing, and under what rules of procedure such joint conferences or hearings may be initiated and carried forward: Therefore be it

"*Resolved*, That the president of this association be authorized to transmit to the chairman of the Interstate Commerce Commission a copy of this resolution, and to advise him that this association would welcome a conference upon the subject matter of this resolution as early as the same may be desired by said Interstate Commerce Commission. Be it further

"*Resolved*, That the president and vice presidents of this association, together with the executive committee and the general solicitor, be authorized to represent this association at any such conference as may be arranged by the president with the Interstate Commerce Commission, and that they be directed to report the results, together with their recommendations, if any, to the several commissions and to the next convention of this association, it being, however, understood that any conclusion arrived at in said conference, or any recommendation made by said representatives of this association, shall be in no way binding upon any State commission except as the same shall be adopted by it."

Acting in conformity with said resolution, President Perry, of this association, has instructed me, in his behalf, to transmit this copy of the same to you and to state that if your commission deems a conference upon the subject matter of the resolution desirable this association will welcome such a conference as early as may be desired by your commission.

I may say that President Perry has asked me to present this matter so that I may act for him in conferring with you, looking toward the making of arrangements for such conference if that shall be desired.

Very truly, yours,

JOHN E. BENTON, *General Solicitor.*

To this letter a reply was received as follows:

INTERSTATE COMMERCE COMMISSION,
Washington, D. C., January 5, 1921.

Mr. JOHN E. BENTON,
General Solicitor National Association
of Railway and Utilities Commissioners,
Washington, D. C.

DEAR SIR: I laid before the commission your letter to me of December 31, in which you quoted resolution adopted at the recent convention of the National Association of Railway and Utilities Commissioners relative to cooperation between State commissions and the Interstate Commerce Commission, and I am authorized to say that the commission is very pleased to accept the invitation of the national association to arrange for a joint conference with the hope of reaching better understandings relative to this subject.

To that end the commission has appointed the undersigned and Commissioners Daniels and Eastman a committee to represent it in such conference. I shall be glad to take up with you at any mutually convenient time the question of time for meeting. The press of official duties is so great that it seems impracticable for us to attempt to attend a meeting elsewhere than at Washington.

Yours, very truly,

EDGAR E. CLARK, *Chairman.*

According to arrangements made by the general solicitor with Chairman Clark, the proposed conference was held in the general hearing room of the Interstate Commerce Commission in Washington on January 22, 1921. It was attended by the members of the Interstate Commerce Commission named in Chairman Clark's letter, and by President Perry; Hon. C. M. Reed, of Kansas; Hon. J. W. Raish, of the South Dakota commission (sitting on the proxy of Hon. J. J. Murphy, of the South Dakota commission); and General Solicitor Benton.

Following the conference a report was made by the committee to the several commissions covering the conference as follows:

Report on Interstate Commerce Commission conference.

NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS,
Washington, D. C., February 3, 1921.

To the State Commissions:

At the last convention of this association a resolution was passed which is set out in full in my bulletin of November 24, 1920. That resolution directed that if such a conference should be arranged thereunder, the representatives of this association should "report the results, together with their recommendations, if any, to the several commissions, and to the next convention." Acting under the direction of your representatives, I am making this report of results to this date.

As I advised in my bulletin of January 24, the conference was held on January 22. Your association was represented by President Perry, of the Georgia commission; Chairman Burr, of the Florida commission; Hon. J. W. Raish, of the South Dakota commission (acting upon the proxy of Chairman Murphy, of that commission), Hon. C. M. Reed, of the Kansas Court of Industrial Relations, and myself. The Federal commission was represented by a committee, designated by the commission, consisting of Chairman Clark and Commissioners Daniels and Eastman.

At the conference President Perry was requested to open the discussion, and did so. The conference was, however, entirely informal, and all present took part in the discussion. In substance it was stated on behalf of the State commissions that they had united with the Federal commission in urging upon Congress the enactment of the cooperative provisions of the transportation act, with the hope and expectation that they would result in such cooperative action in the way of joint conferences and joint hearings that such conflicts as might appear between State and Federal rates might be by agreement removed by State or Federal authorities, respectively, accordingly as upon such joint harings or conferences it should appear that State or Federal rates, or both, should be changed. The opinion was expressed that the enactment of the law created opportunity for such joint development of facts and common understandings that if embraced occasion should seldom, if ever, arise for the prescribing of intrastate rates by Federal power.

Mr. Perry said that the State commissions were disappointed that no substantial results in the line of cooperation had followed the enactment of the cooperative provisions; that they were uncertain as to what classes of cases the Federal commission considered properly the subject of cooperative effort, and as to how such cooperation should be initiated and carried forward; that they were in the dark as to the Federal commission's disposition and desires, and were wondering, and hence had passed the resolution, so that, if possible, a full understanding on these matters might be obtained.

On behalf of the Federal commission, it was in substance stated to be the disposition of that commission to promote the idea and practice of cooperation; attention was called to the fact that the Federal commission had in several cases requested State commissions to hold hearings upon applications of carriers for certificates of convenience and necessity in construction and abandonment cases, and to submit the record with their recommendations; that the California commission had lately undertaken, at the request of the Federal commission, to hold a hearing and make its recommendations as to the continued joint use of terminal facilities at Oakland in that State; and that in Illinois and Mississippi the Federal commission, at the request of the respective State commissions, had designated examiners to sit with the local commissions in State rate proceedings. The action of the Federal commission in asking this association to appoint representatives to sit in Ex parte 74 was cited.

It was further suggested that the State commissions might be of much aid to the Federal commission through the use of their forces in the administration of the provisions of the transportation act, vesting control over security issues in the Federal commission.

It was, however, stated by Chairman Clark that it did not appear to be wise to attempt to determine in advance "what classes of cases" offer proper opportunity for cooperation, as such attempt might lead to the inclusion of cases which, when they arose, would appear not to be of a character upon which

cooperation could be had and, on the other hand, might exclude some cases which, when they arose, would appear to be proper for cooperation.

On behalf of the State commissions it was stated that the matters of which mention had been made, wherein the Federal commission had invited cooperation, were (not including Ex parte 74) relatively unimportant in comparison with matters of rates and service, and that the limited representation poss ble in Ex parte 74, and the broad nature of the inquiry therein, gave no opportunity to the State commissions to aid in the consideration and settlement of questions involving local rates, such as were brought in question by the State cases instituted before the Federal commission since the decision in Ex parte 74.

It was also suggested to the Federal commission that the authority given to it in the act to avail itself of the "cooperation, services, records, and facilities of State authorities in the enforcement of any provision of (the) this act," opened the way for the Federal commission to designate the several State commissions as local agencies to act for it in car-service matters, and that such designation would obviate questions of conflict of authority, and enable the local commissions to secure prompt and equitable distribution locally of available equipment.

Chairman Clark requested that the suggestions on behalf of the State commissions be made definitely in writing for the further consideration of the Federal commission. Accordingly, upon the afternoon of the day of the conference, the following letter was transmitted to him:

JANUARY 22, 1921.

HON. EDGAR E. CLARK,
Chairman Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: In pursuance of the purpose of the resolution under which our conference with your committee was held to-day, and conforming to the request of your committee that we put into writing definite suggestions as to action hereafter by Federal and State commissions under the cooperative provisions of paagraph (3) of section 13 of the interstate commerce act as amended, the committee representing the National Association of Railway and Utilities Commisisoners directs me to make the following suggestions:

RATE CASES.

That the Federal commission advise the several State commissions that it is the purpose of the Federal commission hereafter, whenever any petition is filed with the Federal commission bringing in issue any intrastate rate, fare, charge, classification, regulation, or practice, before proceeding upon said petition, or makiny any order for an investigation of the matters complained of in said petition: to notify the State commission or State commissions having jurisdiction over such intrastate rate, fare, charge, classification, regulation, or practice of the pendency of such petition, and to invite a conference or suggestions in writing as to procedure upon said petition, with a view to adjusting without hearing, if possible, any conflict between State and Federal requirements that may appear, or in the event that a formal hearing shall be unavoidable with a view to a joint hearing, if the same shall seem advisable to the commissions involved.

That the Federal commission also advise said State commissions that whenever there is pending before any State commission a proceeding involving the relationship between State and Federal rate structures and practices, the Federal commission will welcome suggestions looking toward joint conferences or joint hearings, as may seem necessary and advisable, with a view to the avoidance or removal of conflict between State and Federal requirements.

CAR SERVICE.

That the Federal commission invite the several State commissions to act as agencies of the Federal commission in all matters relating to car service local to their respective States; and that it be understood that in the matter of the distribution of cars already within any State, as between shippers desiring the same, the local commission in that State, subject to any rule of distribution in the interstate commerce act, may require an equitable distribution of the same.

The foregoing suggestions cover the matters which are deemed by the committee of principal importance. We hope that the same will meet the approval of your commission.

Will you kindly send any response that may be made to the undersigned?

Yours, very truly,

JOHN E. BENTON,
General Solicitor.

No reply has as yet been received.

It may be said that the conference was agreeable in that the representatives of the Federal commission indicated the utmost cordiality, and in general terms expressed the desire before mentioned to promote cooperation between Federal and State commissions. On the other hand, the discussion did not result in expressions of agreement upon the propositions which were broached on behalf of the State commissions. While the same were not conclusively negatived, the substantial results of the conference, if any, remain to be hereafter developed.

The commissions will be advised of any reply that may be received from the Federal commission.

JOHN E. BENTON, *General Solicitor.*

To the letter addressed to Chairman Clark, set out in the foregoing report, no response of any character was made until June 24, when the following letter was received:

INTERSTATE COMMERCE COMMISSION,
Washington, June 24, 1921.

Mr. JOHN E. BENTON,
General Solicitor National Association of Railway and Utilities Commissioners, Washington, D. C.

DEAR SIR: The suggestions of the committee of the National Association of Railway and Utilities Commissioners as to action under the cooperative provisions of paragraph 3 of section 13 of the interstate commerce act, which were stated in your letter of January 22, 1921, have not been lost sight of. Reply has been delayed in part by the press of other important matters and in part by our desire to have the matter considered by a full membership of the commission. The matter has now been so considered, and I am authorized to make the following reply:

When a petition is filed with us bringing in issue any intrastate rate, fare, charge, classification, regulation, or practice it is now, and for some time has been, our custom to notify the State commission or commissions having jurisdiction over such intrastate rate, fare, etc., of the pendency of the petition and of the time and place of hearing. Your committee now suggests that before proceeding upon such petition or entering any order for investigation thereon we invite a conference with the State commission or commissions, or suggestions from them in writing as to the procedure upon the petition "with a view to adjusting without hearing, if possible, any conflict between State and Federal requirements that may appear, or, in the event that formal hearing shall be unavoidable, with a view to a joint hearing, if the same shall seem advisable to the commissions involved."

We are in accord with the general principles underlying this suggestion and are disposed to follow them in so far as can consistently be done. We shall be glad to contribute whatever we appropriately can to such a plan of procedure, but we appreciate that in certain cases special circumstances might make such a course unwise and contrary to the public interest. As a necessary corollary of this we shall, of course, be glad if whenever there is pending before any State commission a proceeding involving the relationship between State and Federal rate structures and practices, the State commission will advise us of such proceeding and make such suggestions as it deems desirable looking toward joint conference or joint hearings.

We take it for granted that the members of your association concede the doubt as to the advisability, and indeed the propriety, of joint hearings when interstate and intrastate rates are in conflict because of requirements of the State law which the State commission deems itself powerless to change, or constrained to follow and apply, or because of orders made or authority refused by the State commission, in consequence of which the State commission appears before us as one of the parties litigant.

We are in doubt with regard to the suggestion of your committee that we "invite the several State commissions to act as agencies of the Federal com-

mission in all matters relating to car service local to their several States, and that it be understood that in the matter of distribution of cars already within any State, as between shippers desiring the same, the local commission in that State, subject to any rule of distribution in the interstate commerce act, may require an equitable distribution of the same."

It may be that all State commissions are not equipped or empowered to act in this way. It is difficult to visualize the scope and possible consequences of the adoption of this suggestion. However, if any State commission which feels that it is in a position to act with public advantage as one of our agencies in matters relating to car service will communicate with us and set forth definitely the plan which it has in mind and the public benefits which it believes will result, we shall be most glad to give thorough consideration thereto.

Your committee in its suggestions did not touch upon certain other phases of our activities in which we have been seeking and generally obtaining the cooperation of State commissions, such as matters relating to the construction of new railroad lines or the abandonment of existing lines and authorization of security issues. We assume, however, that our practice in this respect meets with general approval and that we can count upon continued cooperation.

We avail ourselves of this opportunity to express the sincere hope and expectation that now that the unusual strains incident to and growing out of the war are lessening, the interstate and the State regulatory bodies will find common grounds for effective cooperation. You may be assured that such relations are by us deemed desirable, and we hope that they may commend themselves in such manner that they will grow and spread. We appreciate to the full the importance of the provision of the interstate commerce act which authorizes our commission "to avail itself of the cooperation, services, records, and facilities" of State authorities. We hope with the cooperation of the State commissions to make more and more use of this authority as the country gradually returns to normal conditions.

Yours, very truly,

EDGAR E. CLARKE, *Chairman.*

This communication was considered at a meeting of this committee held in Washington August 20, 1921, and the following reply was directed to be made thereto:

NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS,
Washington, D. C., August 20, 1921.

Hon. EDGAR E. CLARK,
Chairman Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: At a meeting of the special committee on cooperation which conferred with you on January 22 last, held at this office yesterday, and attended by the president, vice presidents of the association, all State commission members of the executive committee (except Mr. McAneny, of New York), and the general solicitor, your letter of June 24, 1921, was considered, and by unanimous vote of those present I was directed to make response as follows:

We appreciate both the candor with which you make clear your position with respect to the propositions contained in our letter of January 22 last, and the spirit of courtesy and good will which would appear to have prompted you at the same time to express accord with the general principles underlying those propositions, and a disposition to follow them so far as can consistently be done.

We take note of the following portion of your letter:

"We take it for granted that the members of your association concede the doubt as to the advisability, and indeed the propriety, of joint hearings when interstate and intrastate rates are in conflict because of requirements of the State law which the State commission deems itself powerless to change, or constrained to follow and apply, or because of orders made or authority refused by the State commission, in consequence of which the State commission appears before us as one of the parties litigant."

We assume that the paragraph quoted was intended to express the views of your commission rather than those entertained by the members of this association. It is obvious that if both rates prescribed by authority of a State through statutes and those imposed by commission requirements are inappropriate for cooperative consideration, there can be no joint consideration of "rate structures and practices of carriers subject to the jurisdiction" of such

commissions. While we may regret the view which you appear to take of this matter, we have no disposition to enter upon any argument concerning it.

For the purpose of keeping our own position entirely clear, however, we would say that we have regarded the character of cooperation authorized by paragraph (3) of section 13 as in every way proper, because expressly sanctioned by Congress.

We have not considered that State regulatory commissions can ever be parties litigant before the Federal commission until they voluntarily become such. Our suggestion looked toward the avoidance of the necessity of assuming that status.

So far as statutory rates, over which the State commission has no control, are concerned, they have seemed to us proper for cooperative consideration. Such consideration might in any case lead to the common conclusion that the alleged discrimination does not exist, or that it is produced by interstate rates that ought to be changed, or that the State commission ought to recommend to the State legislature modification of the statute.

So far as rates prescribed, or kept in force, by a State commission are concerned, we have regarded those also as proper for cooperative consideration, because they are exclusively subject to the jurisdiction of the State commission, unless they conflict in a discriminatory way with interstate rates. All of the discussion of cooperation which antedated the enactment of the provisions of section 13(3), of which we have any knowledge, went upon the theory that frank and full discussion and comparison of information and views would in a given case be likely to lead to common conclusions, either as to the nonexistence of discrimination or as to the method by which it should be removed.

We note your suggestion that you will be glad "if whenever there is pending before any State commission a proceeding involving the relationship between State and Federal rate structures and practices" the State commission will advise the Federal commission of such proceeding "and make such suggestions as it deems desirable looking toward joint conferences or joint hearings." This we assume to be in reply to the second paragraph of our letter under the subject of "Rate cases." That paragraph was, of course, a corollary to the paragraph which immediately preceded it. Inasmuch as what you say on this point will naturally be read in connection with the above-quoted paragraph of your own letter immediately following the same, there may be, in the minds of some commissioners, some uncertainty as to whether or not it is intended to be implied that you would consider it proper to take part in a joint hearing which will result in the fixing of rates which may later be litigated before the Federal commission.

We note that you are in doubt with regard to our suggestion that your commission "invite the several State commissions to act as agencies of the Federal commission in all matters relating to car service local to the several States, etc." In view of what you say we do not think any State commission will feel disposed to press the suggestion made in our letter. We are, of course, aware that some of the States do not have a sufficient staff of employees to render any considerable service in car-service matters, but in the States where there is most transportation business, and most need for some authority that can be easily applied to and can act quickly in car-service matters, the commissions are well equipped. If constituted agencies of your commission they would, so far as they exercise Federal power, be subject to your direction and the agencies would be terminated whenever results might appear not conducive to public advantage. If anything were to be attempted along this line, the definite plan to be adopted would seem most likely to be satisfactory if worked out jointly between the technical representatives of your car-service bureau and like representatives of State commissions.

We note the statements and expressions contained in the concluding paragraphs of your letter, and feel that we can confidently say that the State commissions are disposed to extend to your commission at any time, to the fullest extent deemed practicable by them under all circumstances, any assistance which they may be in a position to give.

Yours, very truly,

JOHN E. BENTON, *General Solicitor.*

ACTION OF FEDERAL COMMISSION UNAFFECTED BY CONFERENCE.

In proceedings instituted before the Interstate Commerce Commission subsequent to January 22, 1921, and also subsequent to June 24, involving alleged

discriminatory rates, the Interstate Commerce Commission proceeded to order investigations in the same manner as previously, without inviting conferences with or suggestions in writing from State commissions involved.

CONCLUSIONS OF COMMITTEE.

Based upon the facts set forth in this report your committee has reached and reports conclusions as follows:

The Interstate Commerce Commission is disposed to cultivate relations of friendliness with the State commissions individually and collectively as represented by this accociation. For that reason it refrains from categorically declining the proposals made by the committee, as hereinbefore stated, in this report.

That commission is, however, by action of the majority of its members, taken in the several cases involving alleged discriminatory State rates, committed to the proposition that it has full power to review such rates, not only as to their discriminatory character as affecting persons or localities, but also as to their reasonableness from a revenue point of view. This claim of power has been sustained by subordinate Federal courts, and the commission expects it will be sustained by the United States Supreme Court.

If that commission does in fact have power to deal with intrastate rates without restraint, it may well take the view that it is unnecessary and perhaps unwise to invite to sit with it, upon hearings involving such rates, those who can exercise no power to determine what the rates involved shall be in the future. Whatever may be the reason for its position, that commission is not now disposed to enter upon cooperative hearings in proceeding before it involving State rates.

The Interstate Commerce Commission is apparently prepared to take part in cooperative hearings before the State commissions, if invited so to do. In security-issues cases also and cases involving the issuance of certificates of convenience and necessity, and perhaps in some others, it is disposed to avail itself of such services as the State commissions upon request may be prepared to perform, and in such cases it is disposed to afford opportunity for expression of views by the State commissions involved. Further than in this purely minor way there is no present disposition or purpose on the part of the Interstate Commerce Commission to act under the cooperative provisions of paragraph (3) of section 13 of the interstate commerce act, as amended by the transportation act.

This committee is of the opinion that the failure of agreement on the part of the Federal commission with the views of State commissions as to the desirability of cooperation in rate proceedings pending before the Federal commission arises from fundamental differences of opinion as to the extent of the power of the Federal commission over intrastate rates.

It is the prevailing opinion of the State commissioners that the Federal commission does not have power to advance intrastate rates for the purpose of making the same reasonable, in its judgment, from a revenue standpoint, but only for the purpose of removing discrimination as to persons or localities. If the power of the Federal commission is thus limited, many reasons are obvious why it would be advantageous if rate readjustments in cases of alleged discrimination might be considered by both Federal and State commissions in joint hearings whereby in any case a comprehensive plan of readjustment might be adopted and necessary or desirable changes in both Federal and State rate structures made by the proper commissions.

The desirability of such cooperation, however, rests upon the assumption that there is a field within which the Federal commission can not act. In order that joint hearings may work out satisfactorily, both State and Federal commissions must have well recognized powers and responsibilities. If they have such powers and responsibilities, then, without a surrender of the same on either side, they may conduct joint investigations for the purpose of developing the facts, and of reaching agreement as to how their respective powers shall be exercised.

On the other hand, however, if the power of the Federal commission is dominant as to all State rates which are brought in question before it, the desirability of joint hearings is open to serious question. In that case State commissioners sitting with the Federal commission would be under the restraints imposed by considerations of courtesy which would unavoidably arise from the fact of their participation upon invitation in proceedings with respect to

which they could exercise no power, and hence could have no final responsibility. In the opinion of this committee cooperative hearings are not desirable under such circumstances.

If it should ultimately be determined that the power of State commissions to determine finally the reasonableness of intrastate rates has not been destroyed, or subjected to a superior power exercised by the Federal commission, an attitude different from that which is now held may be adopted by the Federal commission, and further consideration of the subject of cooperation may conceivably be desirable. At the present time, however, it is the opinion of the committee that no action relating to that subject should be taken by the convention.

RECOMMENDATION OF THE COMMITTEE.

It is accordingly the recommendation of the committee that this report be accepted, and the committee discharged.

Mr. BENTON. I have already referred to the proffer of cooperation made by the president of our national association, and I have already referred to the invitation by the Interstate Commerce Commission to sit in Ex Parte 74, and what was done. At the convention held in Washington in the fall of 1920, and before any orders of the Interstate Commerce Commission prescribing intrastate rates had been made, but after complaints had been made to the Interstate Commerce Commission that certain State rates were discriminatory against interstate commerce the national association discussed this question of cooperation and the situation which then existed. They had done the things which I have related, indicating the purpose on their part to make the law workable, and they were disconcerted and disappointed that the Federal Commission was proceeding upon those complaints which related to the State rates as if the cooperative provision of section 13 subdivision (3) were not in the act.

A special committee was appointed and communicated with the interstate Commerce Commission, and I will read from the letter which was written, because it will state the situation as concisely as I could otherwise state it, and perhaps more so. The letter was addressed to Chairman Clark, in which the following statement was made, and I will now read certain portions of the letter and the report, which need not be taken down by the reporter and repeated in the record, because they are parts of this entire record which I have asked to be incorporated and which I will submit to the committee.

The CHAIRMAN. That may be done.

Senator FERNALD (interrupting reading). Mr. Benton, I note that the letter of acknowledgment was written five months after the national association's letter was written—just about five months to a day.

Mr. BENTON. Yes, sir.

Senator FERNALD. And, in short, your State commissions at the conference were given to understand that they had no authority; that the authority of the Interstate Commerce Commission under the transportation act was such that they could set aside any orders that might be made by State commissions. Was not that the attitude of the Interstate Commerce Commission?

Mr. BENTON. Senator Fernald, I desire to be entirely accurate in the statement as to the conference——

Senator FERNALD (interposing). Of course; but I wanted to know if that was not their attitude.

Mr. BENTON. That was a matter which was not discussed, the question whether the orders which had taken place before our conference were valid or invalid. You will notice that this conference did not take place until January, and in the meantime the Interstate Commerce Commission had put out orders. The Interstate Commerce Commission treated us very courteously, and we endeavored to avoid controversial matters. We did not attempt to discuss the powers of the Interstate Commerce Commission, except in this way—and it came up incidentally. I may say informally the opinion was expressed by Interstate Commerce Commissioners that the wise, broad, statesmanlike way for the State commissions to proceed was to allow everything the carriers asked for if it fell within the percentages which the Interstate Commerce Commission had allowed as to the other body of rates, interstate rates, and leave to future adjustment any rates which were too high.

At this conference, incidentally, Chairman Clark contrasted the results of different methods of procedure. He called attention to the fact that in Colo-

rado the Colorado commission had followed that course, and that subsequent thereto there had been an adjustment in coal rates, whereas, he said, in the State of Utah the Utah commission held its hearing and refused to allow advances in coal and ore rates, and was held up in a proceeding here which may result in an order which will take from that commission any power or authority over the rates which are covered by the order.

Mr. Chairman and gentlemen of the committee, you will allow me to observe that if it is necessary, in order that a State commission shall retain the power to make reasonable rates it must approve and authorize the putting into effect of unreasonable rates, the law in this country has come to a very astonishing state.

The Utah case was then under consideration, and it was retained under consideration for a long time, and when the commission handed it down they did not advance rates on coal and ore; but the Utah case was the first case in which they came out and recognized clearly it was not possible to enforce upon the States a rigid application of this rule which I have been suggesting, and which the carriers were contending for—that a State must, regardless of conditions or circumstances, advance every intrastate rate by the exact percentage the interstate rates had been advanced.

The CHAIRMAN. There is one point I wish you would make clear, for you have referred to car service: The car-service section of the law had been enacted long before the transportation act of 1920, and so far as the present controversy is concerned there was no substantial change made in it. Do you understand that the provisions that are new in the transportation act of 1920 with regard to cooperation or joint action of State commissions and the Federal commission cover car service?

Mr. BENTON. No; I do not; not so far as joint hearings or joint conferences are concerned, but there is in section 13 subdivision (3) a specific authorization to the Federal commission to make use of the services and facilities of State commissions. And we have always believed that that was put in to allow the most perfect coordination possible of State and Federal commissions, and that it was ample warrant for the carrying out of the suggestions we made. So that my reply should be in the affirmative.

The CHAIRMAN. That is not exactly the point I have in mind. It is claimed by the railroads, and I understand you to say that claim has been sustained by the Interstate Commerce Commission, that the transportation act of 1920 gave to the Interstate Commerce Commission additional powers over State rates. It is not claimed, is it, that there were any additional powers given to the Interstate Commerce Commission over car service?

Mr. BENTON. No; not so far as I know, and it ought not to be. It ought also to be stated that the Congress explicitly put into the transportation act a provision that nothing therein contained should be taken to disable the State from making reasonable orders relative to purely intrastate service. Nevertheless there is doubt in some quarters as to whether the States have any authority over distribution of cars. I will not stop now to explain that, because I want to take up that branch of the amendments we ask for at a later time.

Senator FERNALD. Before you proceed further let us clear up the Utah case. In all the different controversies has there been any other State where the suggestion of the State commission has been carried out or followed by the Interstate Commerce Commission?

Mr. BENTON. The only ones I am now able to think of are, in Nevada, the Interstate Commerce Commission excepted ore but advanced all other rates, and in——

Senator KELLOGG (interposing). Excepting what?

Mr. BENTON. Excepting ore. In Nevada they excepted ore, and in Arizona likewise; also in the latter State live stock, sand, and gravel. And you will note that in Utah, Nevada, and Arizona there was that uniformity of treatment. Between the time that the State commissions refused to permit those advances and the time when the Interstate Commerce Commission came to pass upon the case, the situation there became such that even at the then existing rates many mines in that district had closed and the Interstate Commerce Commission paused in what its apparent program had been and did not make those advances.

I am also reminded that that is true of oil in Kansas, and rates on coal moving less than 30 miles in Indiana. In Arkansas road-building material was retained for further consideration by the State commission, with the intimation that if the rate was not what the Interstate Commerce Commission

thought it ought to be they would change it. The same was true of sugar cane and one or two other commodities in Louisiana. Those are the only instances I think of in the United States where advances asked for by railroads in the States were not granted.

What was said with respect to car service was in the genuine belief that if there was any desire or intention to comply with the recommendation which was made that the commission would desire to have the plans drawn up by representatives of the Federal and State commissions who were trained and able to do that work. It did not seem that it would be profitable, in view of the attitude of the Interstate Commerce Commission, as indicated by the portion of the letter which I have read, and which letter is put in in full, to attempt to elaborate plans to be picked to pieces and objeced to. We were always ready and continued ready to have our technical representatives sit down with their technical representatives and make a proper plan, a plan which seemed likely to work well and meet the approval of both of the State commissions and of the Federal commission.

Now, Mr. Chairman, if I may, I would like to yield at this moment, so that President Jackson may make a statement, as he is obliged to leave the city.

The CHAIRMAN. The committee will hear Mr. Jackson. State your name, official position, and general relation to this subject.

STATEMENT OF HON. CARL D. JACKSON, CHAIRMAN OF THE RAILROAD COMMISSION OF WISCONSIN AND PRESIDENT OF THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS.

Mr. JACKSON. Mr. Chairman and gentlemen of the committee, I have been a member of the commission for seven years, chairman for five years, and have been here and had an opportunity to know about some of the views of the Senators in regard to the passage of the transportation act, and want to express my appreciation of the opportunity extended to me in the past and this opportunity of the present.

In speaking frankly of some aspects of the transportation act, and of its administration by the Interstate Commerce Commission, I trust I shall not be suspected of a want of very deep appreciation of the patriotic motives actuating Congress when the act was passed, and the sincere efforts made to solve the complex and vitally important railroad questions facing the country at the time.

Further, I trust that it will be understood that I entertain sentiments of deep respect, not only for the individual members of the Interstate Commerce Commission and the dignity and great importance of that tribunal, but that I recognize the members are faced by problems—financial, administrative, and of public policy—nearly overwhelming in their nature and demanding far-sighted ability of the highest order.

I have said that the problems they face are of tremendous difficulty and importance, but I do not think this states the entire situation. I believe that the act, and especially the act as now construed and administered by the Interstate Commerce Commission, places upon that administrative body powers beyond human ability to satisfactorily administer, no matter how high the order of ability and character of the gentlemen called to the high office of commissioners.

The act contains two provisions, which lead me to this conclusion: One of the provisions I believe unworkable per se and the other wholly unworkable as construed by the Interstate Commerce Commission, and mainly to these two provisions I will confine myself.

It is my belief that the objects and purposes which were endeavored to be accomplished by section 15a can not be accomplished by it. In speaking of it, Senators, and you, Senator Cummins, as I have spoken and do here now speak, I want to say that I do fully appreciate the objects and purposes of it. I have said that, and I say it again. I am going to merely call attention to some features of it, and other features will be touched upon by others.

The act added no new features or new standards of rate making, or of determining rates in general throughout the country, unless one or two things are so:

(1) In regard to the first question, the matter of aggregate value, which has been criticized in the country considerably, I will not wish to touch upon; and (2) the other feature which may have made a change is that provision which fixes 5½ per cent or 6 per cent, and after March next a fixed per cent to be deter-

mined by the Interstate Commerce Commission as a fair return upon the value of the property within a group.

Now, Senators, if these two did not have the effect of changing the law as it was before it was passed, then I believe there has been no new feature added to those things which should be taken into consideration in fixing fair rates.

Last night I read again the different provisions of section 15a, of the things which should be taken into consideration by the Interstate Commerce Commission in fixing the level of rates. I did not find in that section any element of rate making which they should not have taken into consideration as the act stood before the amendment by the transportation act.

But there has been a great deal of discussion in this country as to whether that provision which made a fixed return necessary, if within the power of the Interstate Commerce Commission, had in fact changed the rule of rate making. If it has acted as a guaranty, which is sincerely claimed by many people and even claimed by the carriers themselves, then it will have changed the rule of rate making. If it added nothing to the old rule, then it did not, because they were bound to give a fair return on a fair valuation of the property, any way.

There is one feature which I will refer to in a minute which does change the rule. That very question came up before the Interstate Commerce Commission a few days ago for discussion in the hay and grain case. As I interpret the decision of that commission it is that they will not treat it as a guaranty; that under conditions which exist it is within the power of the Interstate Commerce Commission to grant reasonable rates regardless of a fair return on the property value and they will do so, but that this law can not be thus taken is claimed by the carriers, who in effect say that this act sets aside the rule of the value of the service, what the traffic will bear, and all the other elements which go to make up a reasonable rate.

The CHAIRMAN. What do you mean by "guaranty"?

Mr. JACKSON. This is what I would take it to mean, although they call it a guaranty, and I am not trying to argue whether it is a guaranty or not; if it was in the nature of a guaranty it would mean that in fixing rates the Interstate Commerce Commission has got to fix rates at a level which will return a certain fixed income, no matter what the condition of the country or the condition of the service or reasonableness of rate.

The CHAIRMAN. You do not mean by the word "guaranty" that the United States must guarantee it?

Mr. JACKSON. No; I do not mean that. I think I better use a different term.

The CHAIRMAN. The Government is not obliged to see that the railroads get a certain return.

Mr. JACKSON. No; but——

The CHAIRMAN (continuing). It can not be a guaranty.

Mr. JACKSON. No.

The CHAIRMAN. So no matter what else it means, that word is not properly used in connection with that part of the act?

Mr. JACKSON. No; not in that case. I say it because it has been common to so use it throughout the country, but it is a misinterpretation of the act. There is no guaranty now. But is there a mandate on the Interstate Commerce Commission under this rule to assure the carriers a certain return regardless of how that is to be got at and regardless of the ordinary rules which do determine reasonableness of rates? They have just held, as I understand, that it is not so.

The CHAIRMAN. Of course I do not think it is so, and do not believe it can be justly contended it is so.

Mr. JACKSON. Nor do I; but that is still the contention of the carriers. Mr. Benton calls my attention to the face that one of the commissioners does in his opinion say that it has got to be taken into consideration, and that it has added something to the law. What is that something? If it has not changed the rule from what it was before this transportation act was passed, then there is no reason for its being there; if it has changed the rule, then in some way it has fixed a new rule of rate making, or it is in the nature of a rule, and, while I may not call it a guaranty because it is not a guaranty by the Government, yet it would be an assurance regardless of conditions existing.

The CHAIRMAN. So far as I am concerned, I think I ought to say at this point—and I shall discuss hereafter, elsewhere, some phases of that subject—it expires by its own limitation on the 1st of next March. Everybody knows that freight rates can not be increased, and that they probably will be decreased

if there are any changes made during that time. But it has become wholly immaterial, so far as my own personal view is concerned, and it might just as well be repealed as to remain in the law until the 1st of March. You do not have to argue five minutes with me on that proposition.

Mr. JACKSON. What goes out, as I understand the law, is the 6 per cent, if they see fit to change it at that time and substitute some other fixed percentage after March of next year.

Now, we come to the second feature, and which I think is the main feature, and one which I wish to talk upon most, Senators, and that is the feature which says that for a certain group the railroads shall have a certain income, and that certain excess profits should be taken by the Government. I never have felt that that was a workable provision, and I just want to call attention to the fact that there are two or three reasons why that is so. In the first place you have the difficulty of administering it.

And I will not now repeat what we put before your committee several years ago when the matter was up—the doctrine that under any circumstances you are doing away possibly with the incentive for economy of operation, and it is economically unsound for that reason. That is all in the record and I am not going to repeat it here. But I do believe that it is so, and that as it comes to work out where there may be excess earnings on any railroad those excess earnings will be difficult of discovery. And there are other difficulties where excess earnings might be hard to capture, among them, that a road has the right to use them for improvements. I understand fully the intent and purpose and the high motives back of this provision, but I doubt if that has added anything to a solution of the railroad problem.

Then you come to this second thought which I had before and which you probably have heard from me before and which I still think exists, and that is this: We will take the western carriers by themselves. They are entitled on the value of their property to something like, we will say for argument, $480,000,000 a year. Suppose they do get $480,000,000 a year at exactly 6 per cent. The level of rates which returns these $480,000,000 a year has been reasonable and proper, we will say. Then suppose two or three carriers that make up the roads entitled to earnings of $480,000,000 a year have earned in excess of their proportion and you are going to take, say, $20,000,000 or $30,000,000 or $40,000,000 from them for the Government. You will have reduced the net return of the carriers within that group below the $480,000,000 by the amount taken; and by that amount you have not given the carriers a reasonable return upon a fair valuation of their property.

On the other hand, this might be done in order that they might still get a fair return on their property: You might make the rates for the group as a whole larger than necessary to give a fair return on a fair valuation of the property, and then still have a capture of certain excess earnings, thereafter leaving the amount necessary to pay the 6 per cent to the carriers upon a fair value put upon the property within the group.

But if you do that will it not follow that the rates are unreasonably high? And will the fact not be that you will have assessed against shipments within that district a certain excess tax in order that it may be taken by the Government for carrier purposes later?

So, I say the act does not of itself seem to have helped the position of the carriers. Personally, I can not see where the carriers would be one bit worse off to-day under the provisions of the act as it stood before, properly administered by the Interstate Commerce Commission; I do not see where the carriers were really helped by it.

The CHAIRMAN. Have you given any attention whatever to a return upon the fair value of the property—and I understand you to regard that as one basis of fixing rates?

Mr. JACKSON. I certainly do, Senator.

The CHAIRMAN. If you have two railroads side by side, competing with each other, and one of them can earn 10 per cent upon the value of its property and the other can earn but 4 per cent, yet both have to do business upon the same rates, that is an insoluble problem, as I look at it, in railroad regulation and will continue to be so until the consolidations which must inevitably take place at some time in the future shall take place.

Mr. JACKSON. I think that is the real solution of the problem—consolidation.

The CHAIRMAN. As I understand it, those parts of the bill to which you have just been referring were brought into the bill in the hope that they would help the country to approach the real solution.

Mr. JACKSON. Yes, sir; I think that was it. I knew enough about what was being discussed here before this committee to know what the object and purpose of it was. There never was a higher motive and purpose for benefiting the people as a whole than was at the bottom of that section. And it was the thought, undoubtedly, that this would not interfere with the giving of reasonable rates to the people, yet to many this act does appear to so interfere with reasonable rates.

The CHAIRMAN. I do not think anyone has ever been foolish enough to claim it was a perfect solution of the question or a perfect answer to it.

Mr. JACKSON. No.

The CHAIRMAN. At least, I have never regarded it as anything more than an approach toward what I regard as the final regulation which we must adopt.

Senator STANLEY. At that point would you mind explaining more fully why you consider consolidations of the fortunately located and the unwisely located and unwisely operated railroads as the necessary solution of this problem?

Mr. JACKSON. Well, now, it depends upon just what you mean by an "unwisely located" railroad. If a railroad is so unwisely located that it——

Senator STANLEY (interposing). Well, let us say less fortunately located.

Mr. JACKSON. Very well. If such roads were absorbed into a general system, the smaller lines and more unfortunately situated lines would be more in the nature of branches to the main line of a now very prosperous railroad, and the whole should prosper much better than the whole are now prospering. Whereas if you take the branches by themselves you may not be able to use those particular railroads as feeders for the main carriers and they will not be as prosperous as they would otherwise be although the system as a whole might be prosperous.

It would do this, too—if the system is permitted to be worked out and which I have not made any thorough study of, although I am in sympathy with the principle—it would tend to give us a more balanced system of revenues and expenses than now prevails among the 208 or 210 first-class railroads of the United States. That is why I think it would be a good thing.

The CHAIRMAN. You will remember that as a component part of this attempted solution we put into the transportation act a provision that was intended to give to the weaker lines a greater division of through revenue than they had before, all for the purpose of sustaining the general system of transportation.

Mr. JACKSON. Yes.

The CHAIRMAN. I regret to say, however, that the decisions of the Interstate Commerce Commission may not, from my standpoint at least, have fully carried out the intention of the Congress.

Mr. JACKSON. While I did not, perhaps, want to say that, and did not have it in mind, I think I will have to agree with you on that, Mr. Chairman.

Senator STANLEY. Do you believe it is possible that those railroads which are normally so situated as to take care of themselves without any Government aid or guaranty or any other arrangement by which they could receive assistance outside of their own exclusive business; do you think that those roads which would normally have made a return of 6 per cent or over can take care of their weaker brothers—less fortunately located railroads—can take them into the lifeboat, so to speak, and not endanger the boat and sink them all? It seems to me that as a result of this consolidation of good and bad roads, none of the roads have earned 6 per cent and the whole system is now in peril.

Mr. JACKSON. Well, I do not look upon it that way quite, not to that extent. I do not think that is going to happen.

Senator STANLEY. That was a question merely asking for information.

Mr. JACKSON. Yes. I do not think you are going to work it out practically. Suppose you were running a business and a part of your profits was to be taken for the benefit of some competitor, how are you going to operate your business, would you be inclined to have as little surplus as possible to give to your competitors, or would you try to have as big a surplus as possible to give a part of it to them?

Senator STANLEY. Just as little as possible, I will answer to that question, which would be the natural way.

The CHAIRMAN. The answer to that is that the Interstate Commerce Commission was given full authority to revise the maintenance and operating expenses of railroads so that any given railroad would not be permitted, if that supervision was efficient and I hope it will be, to expend unnecessary sums in the maintenance and operation of its property.

Mr. JACKSON. Yes.

Senator FERNALD. Mr. Chairman, there is the call for the Senate, and it is now 11 o'clock. Do you purpose to go on with this hearing?

The CHAIRMAN. How are you situated, Mr. Jackson?

Mr. JACKSON. I am trying to give you light from my experience.

The CHAIRMAN. I understand, but can you stay and talk to us further tomorrow?

Mr. JACKSON. I will stay if you say so.

The CHAIRMAN. Then we will take a recess until tomorrow at half-past nine o'clock.

Senator TOWNSEND. Mr. Jackson, I hope you will be back as I want to hear the balance of your statement.

Mr. JACKSON. I will be glad to be here. I had not expected to go into section 15-a to any great extent, but will be glad to discuss the matter further.

(Whereupon at 11 o'clock a. m., the committee adjourned until Thursday, October 27, 1921, at 9.30 o'clock a. m.

MODIFICATION OF TRANSPORTATION ACT, 1920.

THURSDAY, OCTOBER 27, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in room 410, Senate Office Building, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. Mr. Jackson, you may proceed.

STATEMENT OF HON. CARL D. JACKSON—Resumed.

Mr. JACKSON. I was saying, Senator Cummins and members of the committee, when we closed, that section 15 (a) is treated by the carriers in all rate-making cases as doing away with other principles of rate making, and substituting a revenue basis for rate making, and whether this is the law or not this much is certain, that the country as a whole has adopted this view of the act and looks upon it as a guaranty or mandate to the Interstate Commerce Commission to fix rates with this section of controlling significance. And in that respect I also expressed the opinion for what it may be worth, that the fact that there may be a change in the rate of interest fixed after March 1 did not in fact change the effect of the law.

I do not wish, however, to spend any more time on that section, because my time is limited, and I would like to direct attention to the question which I have interested myself in more, and that is the question of the interpretation of the transportation act in the Shreveport cases. In my opinion this has caused a deplorable condition of uncertainty as to authority and power, has led to litigation and general dissatisfaction. I feel, further, that the law is not receiving the interpretation or being administered as those who had most to do with its framing understood it to be when it was passed.

I noticed the other day an interview in regard to the question which you asked me, Senator, in regard to the understanding which we had, and I think most of us expressed—I do not mean agreements, but I mean our own interpretation at the time the law was passed, to the effect that this law had not changed the Shreveport decisions as they had existed before. One of the papers quoted me as having said that I had approved the transportation act when it was passed, but, of course, my position was that of the railroad commissions, and our position was that of not having approved the transportation act, although many of us may have felt that it was not advisable to actively oppose it.

Senator LA FOLLETTE. Some of the members of the committee took that view, too.

Mr. JACKSON. Yes. I do not want to have any misunderstanding in regard to that particular matter, but it was my understanding, Senator, and it is so yet, though the Supreme Court of the United States may hold differently, that the act as passed did not change the Shreveport doctrine except in the matter of fixing minimum as well as maximum rates. And I would like to refer briefly to the interpretation and the situation which is growing out of the interpretation of the act by the Interstate Commerce Commission, as I understand it.

The CHAIRMAN. Mr. Jackson, let us get clear in our minds just what change that did make in the language of the law.

Mr. JACKSON. Well, Senator, in using the language of the law where it said discriminations against persons or localities in intrastate commerce, in that law, Senator——

The CHAIRMAN. Now pardon me. In describing the cases in which the Interstate Commerce Commission might interfere we put in the words, after saying:

"Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. * * *"

Now, those words "against interstate or foreign commerce" are new.

Mr. JACKSON. I would like to say something on that very question.

The CHAIRMAN. Now, that is one change we made.

Mr. JACKSON. Now, may I just explain that right there, if I may?

The CHAIRMAN. Yes.

Mr. JACKSON. If you will look at the three Shreveport cases, Mr. Chairman, which were decided before this act was passed, you will find not only in the decisions of the Interstate Commerce Commission but in the decisions of the Supreme Court itself the use of the very words which you have used—"against interstate commerce"; so, in fact, the bill, as you drew it, Senator, contained the precise words of the Supreme Court of the United States.

The CHAIRMAN. That is the way we understood it, and that is why we put them in.

Mr. JACKSON. Yes; and we thought that we were then adopting, as we understood it, the law as it then stood.

The CHAIRMAN. Precisely.

Mr. JACKSON. There were perhaps some other questions in regard to that particular thing, but I can not see any change——

The CHAIRMAN (interposing). The only change that we made, the only one I understood we were making, was to put in the act these provisions in regard to giving the Interstate Commerce Commission the power, the authority which it did not have before, to substitute or prescribe a rate for the future to take the place of the rate which had been found to be unduly preferential or give unreasonable advantage to one person or locality. Now, those are the only two changes which, as I understood it, we were making in this law.

Mr. JACKSON. Yes.

The CHAIRMAN. I mean in the phraseology of the law.

Mr. JACKSON. Yes.

The CHAIRMAN. And I can not understand how the law can be interpreted in any other way than that. I can not understand how it can be interpreted to broaden the powers of the Interstate Commerce Commission in prescribing State rates. And I would be very glad, of course, to hear—and we will afterwards hear Mr. Benton from the legal standpoint—upon what basis do the claims of the railroads rest in insisting that further changes were made.

Mr. JACKSON. I was just coming to that.

Mr. BENTON. Mr. Chairman, if I may make this observation. We are going to attempt to cover that pretty clearly and fully in the course of the hearing. President Jackson is now going to discuss that aspect of it. I would like, if I may, to make this suggestion to the chairman, which is called for, as it seemed to us in the conference last night, by the exigencies of the situation that exists to-day. I was asked at the beginning to make an opening statement which was intended to be followed by several statements of State commissioners. It was expected that could be completed in a day, but owing to the unavoidable briefness of the sessions it has extended over two or three days, and has not been completed.

It is suspended because there are several commissioners here who have been waiting several days who must give their statements to-day or refrain from giving them at all, and it is thought very desirable that they should put into the record their statements as to concrete situations in their own States, which they can give very much more usefully to the commission than I can. Yesterday we met and time was allotted. They have prepared condensed statements, which will not be repetitions, but which will be pictures of situations in their respective States, and I was asked to say to the committee that because of the situation I have just described they would appreciate it very much if they might be permitted to make their statements without interrogation

and to have the interrogations after the statements as briefly as the matter presented seems to permit of.

The CHAIRMAN. That is a very reasonable request.

Mr. BENTON. And I present that suggestion with a great deal of deference and with all the reluctance in the world, merely because those men must go back without making these statements unless they make them to-day.

The CHAIRMAN. So far as I can control it that will be the course pursued.

Senator LA FOLLETTE. I was about to make this further suggestion: At 11 o'clock the session of the Senate begins. I do not apprehend that we can conclude this morning here—I mean in hearing those who will have to go away. If we could adjourn this hearing over to the committee room in the Capitol we might go on for a while, at least until those who must leave have been heard.

Senator POMERENE. I have no objection.

The CHAIRMAN. Very well; when we suspend here we will resume over there and do the best we can. It has been suggested by Mr. Benton, and I think it is a very reasonable request, that in view of the fact that some of the commissioners must go away, we allow them to proceed without interrogation or without discussion.

Senator LA FOLLETTE. At least until the end of the statement.

Mr. BENTON. Yes; at least until the end of the statement.

Senator POMERENE. That is all right.

Mr. JACKSON. Now I am going to try to explain, as I understand it, what has happened and what is the different treatment of the Shreveport cases under the present practice of the Interstate Commerce Commission from what it was formerly before the bill was adopted.

Senator POMERENE. What State do you represent?

Mr. JACKSON. I am from Wisconsin, Senator. In each one of those three Shreveport cases which went to the Supreme Court of the United States this had taken place—that by the difference in level and different rates which prevailed, interstate and State, there was forced a change of the movement and volume of traffic, interstate and State, compared to what it was without that discriminatory condition existing. In each case this affected a locality and persons in a locality. That was so in the original Shreveport-Texas case, so in the Express case, and so in the Passenger case, where the communities affected were set out, they are shown definitely and certain. That was a proceeding where discrimination existed, and had to be removed, in my opinion.

But they have gone entirely away from that now, as I understand the interpretation of this act by the Interstate Commerce Commission, and have substituted a Shreveport doctrine where that condition as to localities or persons or volume of movement or flow of movement has not been interfered with at all. And they have carried the doctrine now to this extent of interpreting the act to mean, that if there is a difference in level of rates, no matter whether it affects persons or localities, no matter whether it is between two small localities in the center of the State, or otherwise, where it can not possibly affect or does not affect either the volume or flow of the movement of the traffic, but solely on a revenue basis, that there is a discrimination. And these cases, which will be explained fully by Mr. Benton, I will not go into. But what does that mean, Senator? That is actually what has been done in the cases which will be presented to you. They have gone way beyond the case where there is a discrimination between the localities, where the volume of interstate traffic is affected one way or another, and just on a revenue basis raise or lower State rates.

What is the effect of that? They do it, calling it discrimination, and those rates are changed; if not acquiesced in, they become fixed by an order of the United States court. And yet those purely internal rates, which may bear not the slightest relation to interstate commerce, have become fixed and frozen rates, and they are changed by the Interstate Commerce Commission without any examination into their reasonableness per se, because, Senator, that commission have not got the right to examine into the reasonableness of the rate per se and fix State rates as a general thing. They are excluded from that clearly by section 1 of the transportation act. So that rates are changed in a State under the new doctrine, actually changed in a State without any tribunal existing by which the reasonableness per se of a State rate can be determined. And that is exactly what has happened all through the country. State rates are being changed here and there, and it is sometimes hard to tell just why they did it, on just what ground they did it. But they have done this.

In the first few cases from the Interstate Commerce Commission along this line, they placed it on this ground. that a new power, as I understand it, had been given them in the transportation act, because they had to fix rates in accordance with section 15(a) to give a certain amount of return to the carriers, That they could not do that unless they could fix all State rates too, and therefore, in spite of the express exclusion of their jurisdiction in section 1 of the act to fix the reasonableness of State rates, they are going ahead and assume—because this 15(a) exists there—that that has enlarged, increased, and given them complete jurisdiction over all State rates.

There is one other thing in connection with it. In fixing these rates, Senators, this is what happens very often: A large part of the rates which are made by the Interstate Commerce Commission are not fixed so much by the determination of the reasonableness of the rates as upon a determination—and this applies to their own rates as well as where the Shreveport case exists—upon a determination that the rates between certain points are discriminatory, and then the usual order is—and this has been quite a growing practice, as I look at it—to say that rates between points which differ from each other by more than a certain amount are discriminatory, and, in so far as they do differ from each other by more than a certain amount, that discrimination must be removed, and then they go ahead and the mandate is that the carrier must remove it.

Now, in many cases you can not tell until after the carriers have filed their tariffs how that discrimination is going to be removed. You do not know whether they are going to lower the rate between A and B or raise the rate between C and D, and you can not tell—of course, most of us know how it will be done. We do not have to worry about how it will eventually be done; but so far as the interstate commerce act is concerned they can do it in either one of several ways. We have a case of our own in which you could not tell until the tariffs were filed. It has not yet become very serious in the State. But what is the net result?

The carriers are given this right to remove discrimination by doing one of two things, or several things, and they may change both rates involved in the discrimination, or lower one rate or raise the other rate wholly to make up any difference, and that rate then becomes the State rate whichever way they take it. In other words, through this interpretation of the act and through the form of the order issued by the Interstate Commerce Commission, the Interstate Commerce Commission has delegated to the carriers themselves in many cases the right to determine the State rate as they see fit. And no tribunal anywhere has power to go into the question of the reasonableness of the rates themselves.

Very often interstate-commerce rates, purely interstate commerce, differ from each other in level in sections close to each other. Sometimes the Interstate Commerce Commission finds that the rates are discriminatory because of this difference in levels. Very often they find that that difference in level does not constitute an unreasonable discrimination, and I want to say that very often a difference in level does not constitute a discrimination, and especially so if you take into consideration the local conditions which exist.

I can illustrate that by two classes of rates in my own State. For instance, we have lower rates on sand and gravel for the first hundred miles, probably, than exist in any of our surrounding States. Nobody claims that that is discrimination. The reason for that is this, in part: You can open a gravel pit anywhere in the State of Wisconsin, in any 15 miles, except in a certain section, and can begin hauling gravel, and begin doing it by automobile. Now, either those rates had to be lowered—and it would be a benefit if they were lowered—so as to use the developed pits, or there would not be any movement. So we changed those rates there. I am informed by the carriers themselves that the change was beneficial and they did not object to it and that it has produced a large volume of movement, which was compensatory, and has been a benefit to them. It has been a benefit to the building trade, because they got a higher grade of material than they would otherwise get. So, although those sand and gravel rates are lower for those mileages than they are in the surrounding States, on the whole they are not discriminatory.

On the other hand, our coal rates are higher and the rates to many destinations the same, no matter from which port they come. These ports are assumed by the Interstate Commerce Commission to be more or less mines, and the level of those rates is probably higher than in Iowa, Senator, or than in Illinois. That particular fact does not of itself constitute discrimination. One has to know the local conditions and the reasons for the thing. Just the mere

statement that a rate is so-and-so in Iowa, so-and-so in Minnesota, or so-and-so in Illinois, does not make the rates in and of themselves discriminatory.

My theory of discrimination is this—much along the line of Senator Nicholson's bill—that the doctrine of discrimination as applied to States should be confined to those situations where the difference in the level is such as to affect the volume and the flow of traffic. If it does actually materially affect the volume and flow of traffic it will affect persons and localities. And my belief is this, that if this doctrine of discrimination is to be stretched clear out so that the question depends on how the Interstate Commerce Commission shall look at a revenue question and practically nothing else, that you have practically destroyed State regulation, and that the Interstate Commerce Commission has substituted an entirely new rule of rate making, has taken upon itself an impossible burden of making State rates, and is going to make them, if it makes them at all, regardless of local conditions, which are so important, and that it is simply beyond them to do this to the satisfaction of the people or the best interests either of the carriers or the shipping public.

You can not have knowledge in a tribunal here in Washington, no matter how great the ability of those who are administering the law, that can understand all local situations.

My time is about up, but I want to state to you what I think is really, after all—I did not think so at first—about the most practical system of rate making. I believe that system of rate making is best which takes into consideration the condition of the carriers, business, trade and all that. I believe it is best, as it functions quickest, and with the least red tape. I believe our system in Wisconsin, where we can make a rate by telegraph in 20 minutes, which we have done many and many a time, to permit shipments, and to meet conditions which have existed, with our knowledge of what we were doing, and with our knowledge of whether it was just or right, has been for the benefit of the shippers and the carriers. There is no Shreveport case at present against Wisconsin, and we are free there. It has been for the benefit of the shippers and carriers. We are changing rates all the while.

If we have to come down to Washington every time we wanted a rate changed, and we had our rates frozen in the State of Wisconsin as the great State of Illinois has its rates frozen, with no tribunal to which you can go to change a State rate alone, if every time you wanted to change a State rate in the State of Wisconsin for the benefit of everybody you had to come to the great capital here at Washington and go through the forms which are very elaborate for changing even a simple rate, why, then, you simply have enforced a nonelestic, impossible system of rate making which is not for the benefit of the shippers, the State, or the carriers. I can not believe that it is.

I want to state one other thing right here, if I may, so that there may not be any misinterpretation of the position of those who come here. The men who come here, Senators, are men who mostly represent public utilities commissions, as well as railroad commissions, from all over the United States. They are men who have been through the fire, who have carried public utilities through alive all over this country, have taken the public blame, where it was unreasonable very often, who have done their duty, and have done justice to the utilities and saved them and brought them through all of these crises. They are not men who are just coming down here through some spirit of jealousy. They are not actuated by any propaganda against carriers. We all appreciate that the carriers, if they are going to perform the service properly, must have rates which will allow them to perform their service properly. But we do think that this tendency, which has unconsciously been gowing up, to take control of the immense, intricate rates all over the United States, either freeze them up or change them without knowing why they are changing them, is not in the public interest, is not in the interest of the shipper, and is not in the interest of the carriers.

I thank you, gentlemen.

The CHAIRMAN. I may say to those members who have come in since the statement was made that there are certain of the commissioners from outside who can not remain over the day, and therefore it has been the sense of the members who have been here that we allow them to go on and make their statements without interruption, so far as that seems possible.

Who will be your next witness, Mr. Benton?

Mr. BENTON. Judge Hale, of New York, Senator.

STATEMENT OF HON. LEDYARD P. HALE, COUNSEL TO THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

The CHAIRMAN. Will you state your name?

Mr. HALE. Ledyard P. Hale.

The CHAIRMAN. And your relation to this subject?

Mr. HALE. I am counsel to the Public Service Commission of the State of New York.

I will take very little time indeed. All I want is to present, Senator, the facts of the New York case, and how it was presented to the New York commission.

Senator POMERENE. That is the case that is now in the Supreme Court?

Mr. HALE. That is now in the Supreme Court. It has been argued, but not decided, and I assume that a decision will await reargument in the Wisconsin case.

Now, I have here the original complaint made on the 4th day of August, 1920, and there is no word in it except that on account of the recent order of the Interstate Commerce Commission in Ex parte 74 there was thereby created a discrimination between the interstate and State rates.

The CHAIRMAN. That is, a difference?

Mr. HALE. A difference. And therefore the State rate must be advanced so that there should not be any discrimination. There was no fault found with any rate, not even with the 2-cent rate of the New York Central Railroad between Albany and Buffalo, which is as old as the railroads composing the original New York Central, which ran only between Albany and Buffalo, did not communicate with New York directly. That, even, was not alleged to be confiscatory or unreasonable, but it was simply alleged that inasmuch as the order of the Interstate Commerce Commission increased the rate from 3 cents a mile, as fixed by the Federal administration during the war, to 3.6 cents, that all our local rates, without any regard to the character of the service or its value or to the value of the property, or otherwise, should be advanced to the same figure.

I have here a copy of the complaint which I will file with the committee. It is very brief and very much to the point.

The CHAIRMAN. That will be inserted in the record.

(The complaint is as follows:)

In the matter of advances in railroad rates.

The PUBLIC SERVICE COMMISSION,
State of New York, Second District:

The steam railroad companies of the State of New York represent to your honorable commission as follows:

That heretofore and beginning upon the 24th day of May, 1920, the Interstate Commerce Commission, in accordance with the directions of section 15 (a) of the interstate commerce act, as inserted by the transportation act of 1920, held hearings, took the testimony of many witnesses, and received numerous exhibits relating to the facts as to the railroads of the continental United States with a view to determining whether, under the provisions of the said section 15 (a) and under the facts as presented to them, increased rates should be granted to the carriers in order that the rate of return prescribed by said section 15 (a) should be received by the carriers. It is understood that a copy of the record in this proceeding has been lodged with your honorable body.

That on the 20th day of July, 1920, the United States Railroad Labor Board, a board duly appointed in pursuance of the provisions of the transportation act, handed down a decision in a controversy then pending before it, relative to the compensation of the employees of carriers by railroad in the United States, among others carriers by railroad in the State of New York, whereunder and whereby large additional increases in operating expenses resulted to said railroads, and that thereupon the steam railroad companies filed with the Interstate Commerce Commission supplementary suggestions relative to additional revenue, which would be needed in order to meet the additional expenses contributable to the decision of the Labor Board.

That on the 31st day of July, 1920, the Interstate Commerce Commission handed down its decision in the above matter with an opinion, a copy of which is hereto attached, granting increases in freight rates, in passenger rates, and in charges for certain incidental services detailed in the opinion. The increases authorized by the Interstate Commerce Commission are, as appears

in the said report, permitted to become effective on five days' notice to the public.

The carriers by railroad in the State of New York are in that rate district which is, in the opinion of the commission, denominated the "eastern district," and the increase in freight rates which is authorized to be made by these carriers is 40 per cent above the rates now in force. The increase in the incidental services mentioned in the opinion is also 40 per cent. The increase in passenger rates is 20 per cent, such passenger rates including standard local or interline fares, excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club-car charges. An increase of 20 per cent is granted on rates upon milk and cream and an increase is granted upon excess-baggage rates. A surcharge is granted upon passengers in sleeping or parlor cars.

To the end that undue and unreasonable discrimination may be avoided and that the increases in transportation charges may be fairly nd equitably distributed throughout eastern territory, advances should be made in the transportation charges applicable to intrastate traffic in conformity with and to the extent of those authorized by the Interstate Commerce Commission on interstate traffic. The advances in the intrastate transportation charges should be made effective on the same date as the advances in the interstate transportation charges. The advances in the interstate transportation charges are proposed to be shown by brief supplements to existing tariffs.

The steam railroad companies of the State of New York therefore respectfully request that this honorable commission, in pursuance with the power vested in it by the public service commissions law of the State of New York, permit these carriers, by brief supplements to existing tariffs, to make advances on all the transportation charges applicable to intrastate traffic, including freight rates, passenger fares, charges for the transportation of baggage, milk and cream rates, and the other miscellaneous services specifically mentioned in the decision of the Interstate Commerce Commission in conformity with and to the extent of the advances authorized by the Interstate Commerce Commission on interstate transportation charges applicable to intrastate traffic, and to make such advances effective on five days' notice to the public.

If it should seem best to your honorable body that a hearing should be had respecting the tariffs as to freight rates or as to passenger rates, or as to both, it is respectfully requested that a date for such hearing be set as early as is convenient to the commission, as the supplements referred to above will be filed with the Interstate Commerce Commission and the effective date therein named within a very short time and uniform action is highly desirable.

CHARLES C. PAULDING,
On behalf of steam railroads in the State of New York.
DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
By P. J. FLYNN, *Vice President.*
LEHIGH VALLEY RAILROAD CO.,
By C. A. BLOOD, *Traffic Manager.*

Dated August 4, 1920.

Mr. HALE. I wish to call attention to this language in the complaint:

"To the end that undue and unreasonable discrimination may be avoided and that the increases in transportation charges may be fairly and equitably distributed throughout eastern territory, advances should be made in the transportation charges applicable to intrastate traffic in conformity with and to the extent of those authorized by the Interstate Commerce Commission on interstate traffic."

I do not need to enlarge. That is the whole of it.

Now, the order entered on that particular petition was that the case be dismissed, because on a later petition, which I will hand in to the committee, the whole matter of freight rates was taken care of by another order.

(The opinions of the New York commission referred to are on file with the committee.)

Senator POMERENE. You mean the order issued by your New York State commission, do you?

Mr. HALE. Yes; but so far as as the passenger rate was concerned, that was a denial of the advance asked for, because the advance asked for was not put upon any basis that the present rate was too low. I have the order and I have the opinion of the commission, which I will file with the committee.

The CHAIRMAN. They will both be inserted in the record.
(The order is as follows:)

Case No. 7704. In the matter of the petition (or complaint) of the New York Central Railroad Co., the Delaware, Lackawanna & Western Railroad Co., the Lehigh Valley Railroad Co., and other steam railroad companies in respect to proposed higher passenger fares.

At a session of the Public Service Commission, second district, held in the city of Albany, State of New York, on the 19th day of August, 1920.

Present: Charles B. Hill (chairman), Frank Irvine, John A. Barhite, Joseph A. Kellogg, George R. Van Namee, commissioners.

Upon the facts found and for the reasons stated in the accompanying opinion, it is

Ordered, That the petition herein be, and the same hereby is, denied, save in so far as it relates to freight rates, and as to such freight rates, that it be dismissed because the subject matter has been determined in case No. 7693.

By the commission.

[SEAL.] FRANCIS E. ROBERTS,
Acting Scretary.

Mr. HALE. So far as that case is concerned, that is all there was to it.

Now, that complaint was dated August 4, 1920. On August 10 came an application for increase in the freight rates, separate and apart from the other, and in that case the order of the commission was that they be permitted to file on short notice their tariffs, which included these advanced rates, but the commission reserved the right to examine any of the rates if complaints were made.

Senator TOWNSEND. What commission are you now talking about—the Interstate Commerce Commission?

Mr. HALE. No; I am talking about the New York State commission's order.

Senator TOWNSEND. All right.

Mr. HALE. There were subsequently a few applications made—sand and gravel particularly—on account of contractors for the State highways, and those rates were lowered without any objection particularly on the part of the carriers.

I have here the petition, the order of the commission, and the opinion of the commission, which I will file with the committee.

The CHAIRMAN. They may be inserted in the record.

Before the Public Service Commission, second district, State of New York. Petition of carriers for authority to increase freight rates on less than statutory notice.

THE PUBLIC SERVICE COMMISSION,
State of New York, Second District.

GENTLEMEN: The steam railroad carriers subject to the commission's jurisdiction hereby petition, by and through the undersigned committee, that the commission issue a special permission order authorizing such carriers to issue and file with the commission, effective August 26, 1920, on not less than five days' notice to the commission and the public, tariffs or supplements to tariffs providing for an increase of 40 per cent in all existing freight rates, except rates on fluid milk, cream, and articles taking same rates, whether transported in ordinary freight trains or special milk trains; an increase of 20 per cent in rates on fluid milk, cream, and articles taking same rates, and an increase of 40 per cent in charges for switching, transit, weighing, diversion, reconsignment, lighterage, floatage, storage (not including track storage), and transfer, where the carriers provide separate charges against shippers for such services, also the revision of switching absorption tariffs so as to provide for the revision of switching absorptions in accordance with the increased switching charges herein petitioned for, subject to the rules and conditions prescribed by the Interstate Commerce Commission as to interstate rates and charges contained in its oponion in the matter of the application of carriers in official, southern, and western classification territories for authority to increase rates (Ex parte No. 74) dated July 29, 1920.

Your petitioners respectfully invite your attention to the statements filed with the Interstate Commerce Commission on behalf of carriers in official

classification territory in the matter of increases of revenues of carriers within official classification territory, copies of which were filed with this commission on May 13, 1920.

Your petitioners also beg to invite your attention to the following documents, copies of which are attached hereto:

1. Supplemental application, filed with the Interstate Commerce Commission on behalf of carriers in official classification territory, in the matter of increases in revenues of carriers within official classification territory, dated July 22, 1920.

2. Copy of opinion of the Interstate Commerce Commission in the matter of the application of carriers in official, southern, and western classification territories for authority to increase rates entitled "Ex parte No. 74," dated July 29, 1920.

3. Copy of letter addressed to Mr. Walter A. Shaw, president National Association of Railway and Utilities Commissioners, dated July 29, 1920, by Hon. William D. B. Ainey, chairman of Public Service Commission of Pennsylvania; Hon. Royal C. Dunn, member of Florida Railroad Commission; Hon. John A. Guiher, member of Iowa Railroad Commission, recommending approval of the proposed increased rates and charges as applicable to intrastate traffic.

4. Special permission order No. 50340 of the Interstate Commerce Commission, dated August 5, 1920, authorizing the publication by blanket supplement, as per form shown therein, of the rates and charges sanctioned in its opinion in Ex parte No. 74.

Your petitioners further respectfully represent that the statements that were filed with the Interstate Commerce Commission by carriers in official classification territory, including carriers subject to the jurisdiction of this commission, of their operating revenues and expenses, net revenues and net railway operating income of such carriers, and estimate of the amount of revenue requisite to insure a fair return upon the property value of such carriers, were based upon and included all of the freight traffic transported by such carriers whether interstate, intrastate, or international.

Your petitioners pray that the commission's order include permission to publish the increased rates and charges herein petitioned for by blanket supplements to existing tariffs as authorized by the Interstate Commerce Commission as to interstate traffic in its special permission order No. 50340, dated August 5, 1920.

Your petitioners further respectfully represent that this petition for increase in freight rates and charges as specified herein is predicated not only upon the revenue necessities of your petitioners as disclosed to the Interstate Commerce Commission in copies of documents attached hereto but also upon established relationships between intrastate and interstate rates, and the necessity of avoiding undue preferences or unjust discriminations by the publication of a uniform measure of increase in all interstate and intrastate rates throughout official classification territory.

Respectfully submitted.

E. T. CAMPBELL,
Freight Traffic Manager, Erie Railroad,
NAT DUKE,
Freight Traffic Manager, Delaware, Lackawanna & Western Railroad,
C. A. BLOOD,
Traffic Manager, Lehigh Valley Railroad,
W. J. MULLIN,
General Traffic Manager, Delaware & Hudson Co.,
W. S. KALLMAN,
Assistant to Vice President, New York Central Lines,
Committee on Behalf of Steam Railroad Carriers in the State of New York.

AUGUST 10, 1920.

Case No. 7693. Petition of steam railroad carriers for relief from the provisions of section 36 of the public service commission's law, as amended June 9, 1917, with respect to freight rates and charges. Section 36 order.

At a session of the Public Service Commission, second district, held in the city of Albany, State of New York, on the 19th day of August, 1920.

Present: Charles B. Hill (chairman), Frank Irvine, John A. Barhite, Joseph A. Kellogg, George R. Van Namee, commissioners.

The steam railroad carriers operating within this commission's jurisdiction having applied for permission to change on short notice their rates and charges applicable to the transportation of freight between points in this State, and in connection therewith having filed a petition for an order granting relief from the provisions of section 36 to the extent that any of the changed rates involved may be less for a longer than for a shorter distance over the same line or route in the same direction, and to the extent that any such rates may be greater than the aggregate of intermediate rates over the same line or route in the same direction until such time as the commission may reach a decision as to the lawfulness and reasonableness of such rates;

And it appearing from this commission's special permission order No. 7363, of date August 19, 1920, that the petitioners have been authorized to establish on short notice the changes in rates requested, but that such rates can not be published and made effective in the manner authorized therein without producing in some instances rates or charges that yield a greater compensation in the aggregate for the transportation of property by freight for a shorter than for a longer distance over the same line or route in the same direction or greater compensation as a through rate than the aggregate of intermediate rates or charges subject to the public service commission's law, in contravention of the thirty-sixth section of said law; it is

Ordered, (1) That as to rates or charges authorized by this commission to be established on short notice under authority of its special permission order No. 7363, of date August 19, 1920, the carriers be, and they are hereby, authorized to establish and maintain the said rates and charges without observing the provisions of the thirty-sixth section of the public service commission's law.

(2) That when the commission passes upon any of the applications for relief from any of the provisions of the thirty-sixth section in respect to rates or charges referred to herein the order issued with relation thereto will automatically cancel the permission herein granted as to the rates or charges covered and affected by such order.

(3) That the rates and charges approved in paragraph (1) above are authorized until November 1, 1920, only; provided that in those instances in which applications for authority to continue any of said rates or charges shall have been filed with this commission on that date the said rates and charges may be continued until the said applications shall be determined.

(4) This permission is available to carriers operating railroads by power other than steam in cases where such carriers conduct freight transportation either locally or jointly with other carriers by rail in like manner to that employed by steam railroad carriers, and if their rates and charges applicable to such transportation are governed by the official classification.

This commission does not hereby approve any rates or charges that may be filed under this permission, all such rates and charges being subject to complaint, investigation, and correction if in conflict with any provision of law.

By the commission.

[SEAL.] FRANCIS E. ROBERTS,
Acting Secretary.

Mr. HALE. When the question came up on the passenger rate, the excess-baggage rate, the Pullman rate, and the milk and cream rate (carried as express on passenger trains), the only application made to the Interstate Commerce Commission by the carriers was that the action of the New York commission should be entirely disregarded because of the order of the Interstate Commerce Commission in Ex parte 74, and because of the mere fact that the commission have built in the State of New York all rates upon the basis of 3.6 cents a mile for passenger traffic, and the other things that accompanied that in the Interstate Commerce Commission's order, that that constituted discrimination against the interstate rate and an undue advantage toward the State rate. And that order remains to-day, with the single exception that in the case of an electric railroad they have taken the title of the electric railroad out of their order in No. 74, and I have that order here and the reason for it and will file it with the committee.

The CHAIRMAN. That may be made a part of the record.

(The report and order of the commission are here printed in full in the record, as follows:)

INTERSTATE COMMERCE COMMISSION.

NO. 11623, IN THE MATTER OF RATES, FARES, AND CHARGES OF THE NEW YORK CENTRAL RAILROAD CO. AND OTHER RAILROAD COMPANIES IN THE STATE OF NEW YORK. SUBMITTED JUNE 2, 1921. DECIDED OCTOBER 4, 1921.

Upon further hearing, order entered in pursuance of our original report herein, 59 I. C. C., 290, modified by striking out the name of the Fonda, Johnstown & Gloversville, Railroad Co.

Baker, Burton & Baker and F. A. Moore for Fonda, Johnstown & Gloversville Railroad Co.; and Visscher, Whalen, Loucks & Murphy for New York Central Railroad Co.

Charles D. Newton and Edward C. Griffin for State of New York; Ledyard P. Hale for Public Service Commission of the State of New York, second district; Ambrose P. Fitz-James for city of Amsterdam, N. Y.; C. J. Hixson for Rectors Parent-Teacher Association; and Charles H. Collins for himself.

REPORT OF THE COMMISSION ON FURTHER HEARING.

LEWIS, Commissioner: In our original report herein (59 I. C. C., 290) we found that the failure of the carriers within the State of New York to increase their standard intrastate fares and charges for the transportation of passengers in New York to correspond with the increases made by them in their interstate fares and charges resulted in undue prejudice to persons traveling in interstate commerce within the State of New York and between points in that and other States; in undue preference and advantage to persons traveling intrastate in New York, and in unjust discrimination against interstate commerce. By our order we required the carriers to remove the undue prejudice, preference, and advantage, and unjust discrimination by increasing their fares and charges for intrastate application in New York.

On February 19, 1921, for good cause shown, the proceeding was reopened for further hearing on the single question of whether or not our findings and order should be modified in so far as they applied to the Fonda, Johnstown & Gloversville Railroad Co., on the ground that the intrastate rates, fares, and charges of said company are not so related to interstate rates, fares, and charges as to contravene the provisions of the interstate commerce act. The company will hereinafter be referred to as the respondent.

Respondent operates an electric and steam railroad wholly within the State of New York. It was organized in December, 1902, through the consolidation of a company of the same name owning and operating a steam railroad, 25.5 miles in length, from Fonda northeast through Johnstown and Gloversville to Northville; an electric line operating within the city of Amsterdam and which was being extended easterly to Schenectady and westerly to Tribes Hill; and an electric line from Gloversville through Johnstown to Fonda, and being extended to Tribes Hill.

Following the consolidation the electric lines were extended and now, in addition to the steam road referred to, there is an electric line paralleling the steam road from Gloversville, south to Fonda, 8.7 miles, and an electric line from Gloversville, through Johnstown, Tribes Hill, and Amsterdam, southeast to Schenectady, 32.5 miles. In addition there are two short branches, one electric and one steam. Between Tribes Hill and Schenectady respondent's electric line closely parallels the line of the New York Central Railroad.

Respondent operates steam freight trains throughout the year, and steam passenger trains during two months in the summer, between Fonda and Northville; at other seasons it operates steam passenger trains north of Gloversville only. The electric division between Gloversville and Schenectady is devoted almost exclusively to passenger traffic. Interline tickets are sold only at Johnstown, Gloversville, and points north thereof. Baggage is handled only between Northville and Fonda, but by an arrangement with the New York Central baggage is accepted by that line at Fonda, although passengers may travel over respondent's line by way of Schenectady. Respondent operates no parlor or sleeping cars and handles a negligible amount of milk and cream. During 1919 but 146,762 passengers were handled over the steam division, as compared with 6,380,973 over the electric division. Respondent's total passenger revenue for the year 1920, was $886,667.59. The interstate passenger business yielded only $1,107.15 of this, or less than 0.25 per cent.

Respondent was not among the carriers upon whose petition this proceeding was originally instituted, and upon further hearing made no showing of necessity for increasing its passenger fares to the basis of 3.6 cents per mile. Our original order in this case applied to the carriers named only "as they respectively participate in the transportation." Respondent does not "participate in the transportation" as that term is used in the order. The order will accordingly be modified by striking respondent's corporate title therefrom.

Commissioner Daniels dissents.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of October, 1921.

No. 11623. In the Matter of Rates, Fares, and Charges of the New York Central Railroad Company and Other Railroad Companies in the State of New York.

It appearing, That on November 13, 1920, the commission entered its original report and order in the above-entitled proceding, and that on February 19, 1921, this proceeding was reopened for further consideration of the intrastate rates, fares, and charges of the Fonda, Johnstown & Gloversville Railroad Co. between points in the State of New York;

It further appearing, That a further hearing has been had, and that the commission, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the said order of November 13, 1920, be, and it is hereby, modified by striking therefrom the corporate title of the carrier, Fonda, Johnstown & Gloversville Railroad Co., referred to in the first paragraph hereof.

By the commission:

[SEAL.] GEORGE B. MCGINTY, *Secretary*.

Mr. HALE. I have reexamined in the last 48 hours my brief which I used before the Interstate Commerce Commission, in which I set out very briefly, but I think clearly, the proposition that I have just stated here, namely, that all the New York commission was asked at any time to do was to sign on the dotted line. Now, I do not want to be misunderstood. The State of New York is not here asking for any crumbs that may fall off the table of the Interstate Commerce Commission, but we do not believe that the bill which you were instrumental in drafting intended any such result as has actually practically resulted, and we do not believe that the Congress, with its attention called to it, is going to persist in the present ruling; that is, going to sanction the present ruling.

Senator PITTMAN. Mr. Hale, does your brief contain the statute of New York?

Mr. HALE. No; but one of these opinions does.

Senator PITTMAN. The opinion does?

Mr. HALE. Yes.

Senator PITTMAN. Did they file any character of written application with your commission?

Mr. HALE. They filed their tariffs subsequently.

Senator PITTMAN. Did they make any application to your commission at all, and if so, in what form?

Mr. HALE. Oh, yes; they made an application to the commission to put these increased rates in on short notice, both passenger and freight.

Senator PITTMAN. What was the form of that application?

Mr. HALE. I have introduced it here in evidence and filed it with the committee.

Senator PITTMAN. That is here?

Mr. HALE. That is here in both cases.

Senator PITTMAN. And did the commission up there at that time tell them why that application was insufficient?

Mr. HALE. Yes; very plainly. They said that they had jurisdiction to increase those rates under the basis of the rule established in New York in 1910, or even earlier, on the basis of reasonableness, to avoid confiscation, etc. No question about it. The commission had advanced rates in some cases, and it had been held by the court of appeals, the court of last resort in that State, that the commission was within its powers when it advanced a statutory rate, a statutory rate that had been in existence for 20 years or more.

Senator PITTMAN. Well, was your commission prepared immediately to investigate the application?

Mr. HALE. They were; and they indicated it in the broadest way, as you will see from the opinion. They said to these New York carriers: "If you have a case on the merits that you want to present, we will give it immediate attention, and we will endeavor to get a result, so that the rate, whatever it is, shall go into effect at the same time as the rate required by Ex parte 74, or as shortly thereafter as may be."

Senator PITTMAN. Well, did any of the representatives of the railroads tell you why they refused to take advantage of that offer to give them a hearing?

Mr. HALE. Yes. I would not have spoken of it voluntarily, but I said to Mr. Paulding, the second vice president and one of the counsel, at an interval between the morning and afternoon sessions of our commission: "Why don't you apply to the public service commission in your own State for an increase of the State rates on the basis that you are earning them and ought to receive them?" And his reply was—I am not going to give his reply in the exact words, because I have forgotten them—was to the effect that they thought they had now in the Interstate Commerce Commission a single body which could fix State rates for all the eight States that they operated in, and that while they hadn't any fault to find with the attitude of the New York commission, on the whole they felt that they would rather go before the Interstate Commerce Commission than to go before eight State commissions.

Senator PITTMAN. Who was this attorney?

Mr. HALE. Mr. Paulding—Charles C. Paulding.

Senator PITTMAN. And when you spoke of going before the commission in his own State you meant New York?

Mr. HALE. I meant New York.

Senator PITTMAN. New York State.

Senator LA FOLLETTE. I would suggest, Judge Hale, that you present your brief here and let it be printed as a part of the record.

(The brief mentioned is not printed, but copies are on file with the committee.)

Mr. HALE. Very well. I have a copy here.

Senator POMERENE. Let me ask you this question: Wherein do you claim, if you do claim, that the transportation act changes the power of rate making by the Interstate Commerce Commission over intrastate rate, as compared with the rule laid down by the Supreme Court?

Mr. HALE. I don't think there is any difference, except possibly two. One is a little emphasis on the power of the Interstate Commerce Commission over the question of discrimination. And then I think you must take into consideration—and we in New York must take into consideration—the intention of Congress that revenue should be greater than it has been, and under our act I think there is no question whatever that that is one of the contingencies that we are allowed and required to consider when we fix a local rate in New York, because we know in New York emphatically—the New York Central is an example of a New York railroad that has extended now into Chicago, and into the State of Illinois, and seven other States—we know that it has certain obligations that have been created by its interstate character which it must meet, and, of course, we are willing to consider those things, and it is our duty to do so. I haven't any doubt that in fixing a local rate to-day we have got to consider the obligation of the New York Central and other interstate carriers to meet Federal obligations. Now, if Congress in its wisdom has seen fit to take the whole question of rates over, as it seems to have taken the whole question of securities over, why, that is probably the end of it. But we do not look upon it as having been the intention of Congress so to do.

Senator POMERENE. Well, it is to be assumed that the Supreme Court, in passing upon the Shreveport and other cases, had in mind the necessities of the railroads for revenues, etc., just as Congress had when it passed this bill. Now, you state simply that the only difference that you see, if I understand you correctly, between the Federal statute and the rule as laid down by the United States Supreme Court, is that we have simply added a little emphasis to it, and that we had in consideration the financial necessities of the railroads.

Mr. HALE. I think, Senator Pomerene, that is a fair statement.

Senator POMERENE. Well, now then, of course, it is to be assumed that the State authorities in fixing intrastate rates would have the financial interests of the railroads in mind as well?

Mr. HALE. I do not see how they can dodge it and do their duty.

Senator POMERENE. I do not think so; I do not think so. I ask this question as leading up to the further question: Are you complaining, or are the State commissions complaining, of the provisions of the transportation act in conferring power on the Interstate Commerce Commission, or are you rather complaining of the power which the Interstate Commerce Commission has been exercising or attempting to exercise under that law?

Mr. HALE. The latter.

Senator POMERENE. Well, then, it is not a question of objection to the legislation—objection to the administration of the law?

Mr. HALE. The objection is based on what we considered the false construction of the act. Now, when an act gets construed, the only way to change it is to change the act, and I do not know what the court of last resort is going to do.

Senator POMERENE. Well, that may or may not be, Judge. I assume from your statement of the case—though you have not gone into detail here, I understand—that in this case that is now pending in the Supreme Court, and which has already been argued, you have the question of the proper construction of that act?

Mr. HALE. Yes; we have.

Senator POMERENE. So that that may clear the atmosphere.

Mr. HALE. It may and it may not.

Senator STANLEY. That decision, as I understand it, Judge, will determine whether you wish a different interpretation of the act by the Interstate Commerce Commission, or whether you desire additional legislation by Congress.

Mr. HALE. Well, I assume that the reason why the amendments have been proposed is the fact that the construction given by the Interstate Commerce Commission had been contrary to what was supposed to be the intent of the law. There is a possibility, of course, that the Supreme Court decision will settle all that. I know this: There were dissents in the Interstate Commerce Commission itself—two—one published with the opinion and the other passed over in silence.

Senator STANLEY. These hearings would have a better effect, from your point of view, after these cases are decided by the Supreme Court than at present?

Mr. HALE. Well, I did not choose the time or place.

Senator STANLEY. Well, I wanted to get your view.

The CHAIRMAN. Any suggestion that it was our purpose to abolish the discriminatory features of this legislation and substitute for that the mere revenue consideration, ought to be disposed of by the fact that the House bill did put it upon a revenue basis by employing the words, "undue burden." That is, if any rate was an undue burden upon interstate commerce, that then the Interstate Commerce Commission should have authority to declare the rate void and substitute another instead. Now, in the conference between the two Houses on the bill, the Senate conferees insisted upon striking those words out, and they were stricken out and they are not in the bill, and the very history of the bill shows that we do not intend to depart from the old rule of discrimination. That was my opinion about it.

Mr. HALE. Well, it seems to me that the Interstate Commerce Commission has decidedly departed, and they have attempted, and so far have been successful, in establishing State rates everywhere.

Senator POINDEXTER. Who rendered the dissenting opinion that was published in that case?

Mr. HALE. Commissioner Eastman, Senator. That is all I have. I thank the committee.

The CHAIRMAN. Who is your next witness, Mr. Benton?

Mr. BENTON. Mr. Chairman, I will ask the chairman of the committee on State and Federal legislation, Mr. Webster, to indicate.

The CHAIRMAN. Mr. Webster, we will hear you.

Mr. WEBSTER. Mr. Chairman, I am going to give way to Mr. Russell, chairman of the Oklahoma commission, on account of the shortness of time.

The CHAIRMAN. Very well.

Senator STANLEY. Judge Hale, before you go I want to ask you this one question: If I catch your contention, if I understand your position, it is that the Interstate Commerce Commission and the Congress having taken over the matter of the issue of securities and the making of rates, there is practically no other function left for the commissions?

Mr. HALE. We have a few details like the question of side tracks, or whether a freight car is a suitable station, and something more.

Senator STANLEY. That is all.

STATEMENT OF MR. CAMPBELL RUSSELL, CHAIRMAN OF THE CORPORATION COMMISSION OF OKLAHOMA.

The CHAIRMAN. Will you state your name and your relation to this subject, Mr. Russell?

Mr. RUSSELL. Campbell Russell, chairman of the Corporation Commission of Oklahoma.

I have no prepared or typewritten statement, as I did not come to Washington with the expectation of making a statement to this committee, and I have not studied or analyzed the different measures that are before the Senate, and am not prepared to make any suggestions as to what ought to be done with any part of any measure, nor have I even formed any conclusions in my own mind very definitely as to just how the measure would be applied if its authors were exercising legislative, judicial, and executive authority, as some of our State commissions have to do. But it was thought that a brief statement of just how the matter works out in actual application in a State such as ours might be of interest to the committee.

I have been 40 years in Oklahoma and am pretty well acquainted with all forms of transportation that have been in effect in that country, and being an actual dirt farmer and a breeder and feeder and shipper of live stock I have had a good deal of personal experience in the work of providing products to be transported. I have been for five years—this is my fifth year—a member of the Oklahoma Commission.

Early in 1918—in March—the district Federal court handed down a decision enjoining our State commission from enforcing the rates and charges then in effect in our State. Thus being released, the carriers proceeded to provide a schedule of rates, without restraint, which in their opinion were all that they ought to be. We know what that opinion is. It is all the traffic will bear in their judgment, because none of us have ever seen the time when the carriers were not urgently in need of more funds, and perhaps we never will.

Thus our rates were increased until they were from 25 to 40 per cent, and in some instances higher, than the average of our surrounding States. I believe we figured the average, as near as we could make it, put us 28 per cent above.

Almost immediately following that the director generals' order went forth which placed a 25 per cent blanket increase over the country, and our 128 per cent was increased, just like the other fellows' 100 per cent, so that we then had a 60 per cent increase as compared to a 25 per cent increase for the surrounding States. We were all very patriotic just at that period of time, and tried to rest as quiet as we could, tried to adjust the matter up here and get relief through our Senators and our Members in Congress, and through correspondence with the National Railroad Administration, and we believed that we would.

But, as time went on, and we did not, and as our citizens were daily paying thousands of dollars in excess freight, and as some of our business men were threatened with bankruptcy by having the competitive towns across the border able to come right up to the shadow of their door, almost, with shipments on comparative rates, we finally secured a date with the director general for a personal interview with him. Two of us came to Washington, and led by our Senators and flanked by our Congressmen, we went to this interview, which lasted about 15 minutes, some 12 minutes of the time being occupied by the director general in telling us what a wonderful country this was and what a big job he had and how impossible it was for him to be worried with little details.

The CHAIRMAN. Who was the director general at that time?

Mr. RUSSELL. Mr. McAdoo. By being a little rude we did get about three minutes of that time, after which we received a very cordial handshake and were turned over to Mr. Chambers.

Senator POMERENE. To whom?

Mr. RUSSELL. Mr. Chambers, who was the director of transportation at that time. A very fine old gentleman.

He was a very fine old gentleman, always pleasant, even though we appeared at his office regularly, day after day, and had our little interview, and were given a good-bye handshake and told that he realized that we could not wait here, but they had so many things on that they could not take this matter up yet, but they would look into it after a while.

It had then been more than five months, and we had paid out far more than a million dollars in excess freights, besides serious damage to the

business of many of our men, as we had the record there to show how their business had shrunk and was shrinking rapidly.

Senator LA FOLLETTE. What were the dates of these interviews?

Mr. RUSSELL. This was in September, 1918. The other coming on in March. That is, it was September when we started, and it may have been October when we finished. I have not got the exact dates down.

Senator LA FOLLETTE. About what was the date of the advance in the rates by the railroads, the first advance that they made before this order?

Mr. RUSSELL. The 25th of March, as I recall it, and then the director general's order placing a 25 per cent blanket increase over the country——

Senator POMERENE (interposing). Didn't the 25 per cent rate increase date from July 1st of that year?

Mr. RUSSELL. No; that was before.

Senator LA FOLLETTE. That was an earlier rate?

Mr. RUSSELL. That was before July. I can not give the date of it, as I did not come prepared for this.

Senator POMERENE. What I had in mind was this, and let me be corrected if I am wrong about it. First the application was made for the increase——

Mr. RUSSELL (interposing). No application, no application, this was back in 1918, the first increase we had.

Senator POMERENE. I know. I am not speaking of you individually or your State. The application was made for the increase in wages, and that was handed down some time in May or June. The increase in wages to date from January 1st. But, as I understood it, no increase was made in traffic rates until the increase which was made some time in May or June, to take effect July 1st of that year, and Mr. McAdoo in coming before this committee when he urged further Government operation for four or five years, said that there was a shortage in the revenues for the year 1918, due to the fact that there was one year's increase in wages and only six months' increase in rates. And then he said to us that there would be a net profit during the year 1919 of $100,000,000 under Government operation.

Mr. RUSSELL. Well, Senator, one of us is mistaken as to the dates. The records will show that.

Mr. BENTON. The date of the director general's order, as the Senator says, Mr. Russell, is subsequent to an eariler advance made by the railroads on their own motion.

Mr. RUSSELL. They made an advance on their own motion on the 25th of March, and then the director general's order was pyramided onto that.

The CHAIRMAN. Well, of course, the railroads did not increase their rates during 1918. That was before.

Mr. RUSSELL. In 1918, yes, sir; they increased their rates. First they were left without rates when the rates were enjoined in our State, and then they promptly put in all the rates they wanted, and got 25 per cent onto that.

The CHAIRMAN. The railroad companies could not increase their rates in 1918, because they had nothing to do with rates, because they were not operating the properties.

Mr. RUSSELL. I beg your pardon, Senator, they did increase their rates.

The CHAIRMAN. The director general did that.

Mr. RUSSELL. Senator, the record will show that you are mistaken on that. The railroads themselves provided their rates in Oklahoma after the injunction in the Federal courts.

The CHAIRMAN. That was before Federal control.

Mr. RUSSELL. Just prior, just at the beginning of 1918.

The CHAIRMAN. I understand that.

Mr. RUSSELL. And then the Federal control came on, and then the director general increased the rates right after that.

The CHAIRMAN. Twenty-five per cent.

Mr. RUSSELL. Yes; blanketed on top of that, which made us 60 per cent as against the others.

Now, I must cut this off as short as possible. We stayed here, as I say, probably until October, and day by day we went up here. It got so that pretty soon it was a standing joke with the office boys and the office people, and we shook hands with, and were given the final farewell a good many times by Mr. Chambers, who said, "We can not tell you just what, but we have a plan on hand." And we stayed and waited for some days, and we were friendly enough, and so then finally he told us what they were going to do. He said, "We are going to put in a uniform scale of rates, and we have

it prepared now." Well, we knew that, for our men had nosed in with the clerks there, and had already found it out. But he said, "We are going to put in a uniform scale of rates that will apply all over the Southeast, and Oklahoma will come in with that." We said, "Good. We haven't any objection to putting the rates up. Make them as high as you want to—50 per cent advance, or 100 per cent advance, if the Government needs the money. We won't object to that. All that we ask is that we be permitted to use the transportation system controlled and operated by our Government on similar terms to what it is used by citizens of neighboring States on the same line of road. Beyond that we ask nothing more. Give us our uniforms and let us go home." Well, he thought they would get to that in thirty days.

Well, we stayed here until we got it, and Oklahoma is the only State that ever got that uniform rate, so it was uniform in Oklahoma and nowhere else. And it took off about one-half of our discrimination and left our rates still 10, 20, and in some instances a higher per cent above the surrounding rates. But half a loaf looked mighty good to our folks at that time and kept us quiet for a good while, waiting for a time when the uniforms would be passed around to the other States, which they never were.

And we stated to Mr. Chambers then, when he said, "We know you can't stay for this." We said, "We can not do anything but stay. We can not go home. They have got no use for us down there. If we can not secure some relief from such discrimination as our people are now resting under, then they have got no use for us at home," and, as I said personally, "my colleagues are young enough to go into the service, but I am over age and under weight, and I have to stay here or go to the country and get a job," and we stayed until we got our uniform rate, which, as I say, was uniform in Oklahoma only.

Well, skipping over the time and the efforts that we made, the months wore by and we still had some discrimination, and tried to get some further adjustments, until we came on to the time when the 35 per cent increase was put out. The carriers brought their applications before us, and the people on our side were a little leary after what they had been through. We had to leave our court room and go to the House of Representatives, which was packed full of the representatives of shippers and farmers from over the State, urging that some consideration be given to their particular troubles, and that their rates, which in many instances were already far above all other rates, be not now pyramided with another 35 per cent, but the carriers' attorneys explained to us that it was very necessary to do this now. They introduced testimony given before the director general——

Mr. BENTON (interposing). Before the Interstate Commerce Commission, you mean, Mr. Russell?

Mr. RUSSELL. Yes; before the Interstate Commerce Commission. I thank you.

Mr. BENTON. You are now referring to Ex Parte 74?

Mr. RUSSELL. Yes; I am now referring to Ex parte 74, just last fall. And they then introduced that testimony and told us of their need in general, and then explained to us that "If you now sign on the dotted line here that leaves you in full jurisdiction here of intrastate rates, and we are glad to join with you in ironing out these difficulties." We had some parties there who were very insistent. We had a contract to build roads over here in Tulsa County. We would have had it completed, but we couldn't get equipment. They said, "Now, don't pyramid this rate on us before that goes into effect. It will bankrupt us; we can not do it." But they were quieted down, along with others, and we signed on the dotted line, criticized a good deal, but over a signed statement from the commission, which was published, we said:

"The Interstate Commerce Commission have found that these rates are necessary to rehabilitate the carriers' systems and provide us efficient service. Oklahoma must do her full share, though it be burdensome. If Oklahoma wants to do less than her full share, she will have to get somebody else to deliver her message."

We started in for some readjustment. The Tulsa people referred to came in and filed their case. Some other little cases were filed. We were immediately confronted with the attorneys for the carriers across the table and I said to them frankly, "Gentlemen, good faith upon your part demands that you be here helping to [illegible] brought up before." [illegible] everything, and they did appeal that case to the Supreme Court when it was passed, as they did every other order that we made.

We had only extended their rates for six months. At the end of the six months' period we made a further extension, excepting road-building material. We found this last spring, in April, that the carriers had a great deal of idle equipment, lots of idle motive power, and they were crying for business. Our people were building a good many roads, were voting bonds and wanting to start building many other roads. So we said, "With this idle equipment and idle motive power you can haul our sand and gravel around and help us to build our roads so we can start building new towns and making more business." So we left out road material.

They came to the Interstate Commerce Commission and had us cited in here, in order that we might be brought in here and be enjoined.

Well, when the time came on for the next extension we just announced to the carriers that if we had no authority except to act as a rubber stamp they would have to put a handle on us; that we would not work automatically. We put on our paint and feathers and went off the reservation and issued our order 1883 refusing to further extend any of the increases, either freight or passenger.

Well, of course we did not run on the range very long until they got their lariat on us with an amended application and a hearing which was held in July. They soon had their ring in our nose and a rope around the snubbing post, and were drawing us up pretty close. We began to look around over the situation. Now, we had in mind, frankly, that we would just simply pass it up to the Interstate Commerce Commission. That if we had no authority except to make an order, and then have them appeal and fight it out, we decided that we would turn it over to you, and we will take our case to you and fight it out there.

But we found a little later that the States that had already been branded and put in the corral could get no relief as to State rates; that they were absolutely frozen. The Interstate Commerce Commission said, "We can not bother with this." The States were enjoined. They had no authority. The railroads said, "Sure, we are sorry for you, but we can not help you." And there they were. And we didn't like to get in that attitude, so we thought we had better eat our crow, and we did.

We advertised a date for another hearing, and when it came on some 10 days ago the carriers' attorneys confronted us there and protested against our proceeding with any hearing. We had no authority. This case had already been appealed to the Interstate Commerce Commission, and we had no right to revoke our order. But we overruled them, revoked our order, rescinded all that we had done, ordered in effect the rates in Ex parte 74 as put in effect last fall, with the exception that the fellows with the road-building contracts over in Tulsa County, the case of the road material, which had been appealed to our Supreme Court and sustained—that they should not be disturbed, and that a little switching rate provided down at Ada should not be disturbed, and that a rate that we had made on coal from Henrietta and other points up to Dewey, the cement plant up in the northern part of our State, should not be disturbed. Those people had got their coal mostly from Kansas, but they needed some Oklahoma coal, but they found our rate away above what they were paying, and they applied to us to relieve them from that discrimination, and we put our rates down on a parity with what the rates were from Kansas, for the same distance. And that was then pending in our Supreme Court. We excepted those. And we did not undertake to interfere with them. We wanted them to understand distinctly that if we were not to have the power reserved to pass on little matters like that, then there was no occasion why we should put any rate back into effect at all. We did not want to double cross them on that. But they insisted that we even wipe those out. They would not do anything at all. They refused to join in the application dismissing the case.

Mr. BENTON. They refused to join in the application dismissing the case before the Interstate Commerce Commission?

Mr. RUSSELL. Yes; the application dismissing the case before the Interstate Commerce Commission, though the rates had all been put back, except we would back up against the door and have them bore our ears with an awl. We did not do it. We couldn't do it and didn't do it. And that is our business up here before the Interstate Commerce Commission at this time.

Now, I could mention many other rates in Oklahoma now that without any 35 per cent on them are higher than the adjoining rates are with 35 per cent, but that is going too much in detail for you gentlemen; you haven't got time to hear it, neither has the Interstate Commerce Commission. But just let me mention one little incident.

Ardmore, Okla., which some of the Senators I know remember, is just half way between Oklahoma City and Dallas—equidistant. The rate on spring beds from Oklahoma City to Ardmore is just a little higher without the 35 per cent than it is from Dallas with the 35 per cent. Now, that is too small a matter, of course, for your consideration, or for the consideration of the Interstate Commerce Commission. Yet the people of Ardmore may want some more spring beds, or they may want something else that comes in the same class with them, and there should be some kind of local authority to adjust these matters and look after them.

Now, we did file one case before the Interstate Commerce Commission—and we have a very high regard for that commission, I assure you—last January. We got it heard in April. In that case we showed where, at Texhoma, where the depot sets across the State line, it cost 8 cents a hundred more to ship stuff from the Oklahoma window of the depot than it did from the Texas window. We showed where, at Texola, on the Rock Island, a mile and a quarter from the State line, and where the agricultural territory was developed around it, that there was a town just across the border in Texas, Benonine, where our farmers hauled their stuff across the line through Texola over to Benonine and there got a rate of 15 cents a bushel on their wheat lower than they could get by shipping it from Texola, or $1.25 a bale on their cotton, and yet when it was loaded on the car it came right on the car across the line through Texola. That is the case on trial.

Now, they have been kind enough to inform us that the examiner will be ready next week, and that probably, with the great amount of business they have, that the commission may reach it some time within 6 or 12 months. In other words, that we might get some adjustment of these matters for our children.

But what I want to say is this: There should be some kind of local authority to look after these little matters. There are certain matters besides the sanitary regulations and telephones in the depots that do need attention locally. If the States are not to be permitted to select their own representatives to look after these matters, then there should be some provisions made whereby somebody would be appointed to come down there and get familiar with our conditions, so that they might look after them for us.

The CHAIRMAN. Your idea is that the Interstate Commerce Commission, instead of removing discriminations, has been rapidly creating discriminations?

Mr. RUSSELL. Well, no; I do not charge them with creating discriminations. The discriminations in our State, of which I speak, largely are of long standing, some of them when there was no government in Oklahoma.

The CHAIRMAN. Well, the situation then was this, that you had rates 28 per cent higher than the surrounding States before the war came on?

Mr. RUSSELL. That was not before the Interstate Commerce Commission nor the director general——

The CHAIRMAN. You had 128 per cent before the director general came in?

Mr. RUSSELL. Yes; and his 25 per cent made us 160 per cent.

The CHAIRMAN. And then the director general added 25 per cent more horizontal increase, and then the Interstate Commerce Commission came in last year and added 35 per cent more.

Mr. RUSSELL. Well, we had gotten a partial adjustment in the meantime, but still we have numbers of rates there now that are higher without the 35 per cent, and we have said to the Interstate Commerce Commission—but we don't want to be misunderstood—that we are going to proceed to take those up one after the other and issue orders, but that we are ready to fight them on every one of them that we issue, as we are on the three cases that we have had, but we refused to rescind them ourselves.

The CHAIRMAN. Well, that is a very graphic story.

Senator POMERENE. Let me ask you a question. You told us that the rates in Oklahoma were on an average 28 per cent higher than they were in the adjoining States. And, as I understood you, that condition existed at or before the time that the Government took over the railroads.

Mr. RUSSELL. Yes; before they put on their 25 per cent; yes.

Senator POMERENE. Now, my question is this: Who is responsible for those increases in rates in Oklahoma over the adjoining rates?

Mr. RUSSELL. Prior to that time?

Senator POMERENE. Yes.

Mr. RUSSELL. Well, now, as I stated at the beginning, our old rates which were from back in 1910 or 1911, had been enjoined, and then the carriers put in

rates which they would have like to put in everywhere, but which under the law they could not put in in any other place than Oklahoma. Their hands were free in Oklahoma.

Senator POMERENE. When you speak of these rates being higher, are you speaking of your intrastate rates or interstate?

Mr. RUSSELL. The intrastate rates. The interstate rates were not changed at that time, but they put intrastate rates in Oklahoma at that time as high as they wanted.

Senator POMERENE. Did I understand that at that time you did not have any State commission?

Mr. RUSSELL. Our State commission had just been enjoined.

Senator LA FOLLETTE. When was that?

Mr. RUSSELL. March 25, 1918, I think those rates went in.

Senator POINDEXTER. Was that in the Federal court?

Mr. RUSSELL. Yes.

Senator POINDEXTER. What became of that case?

Mr. RUSSELL. Well, I never followed it up. You know that is past history. We dropped it right there. We were living in a different age and on a different basis, but we did show in this hearing, by evidence that could not be refuted, that the rates now paid by Oklahoma on all her business intrastate are much higher per ton-mile and per car-mile, and that the net revenue in the State of Oklahoma per mile of road is greater than it is in the southwest district.

Senator MYERS. You are not a very ardent advocate of Government control of railroads, are you?

Mr. RUSSELL. No, sir; I am not. There are some shortcomings to it.

Senator LA FOLLETTE. You fared about as well as you did under the commission control?

Mr. RUSSELL. But we are not very strong advocates of anything, gentlemen. We are simply relating some facts. That is all I have to say.

The CHAIRMAN. Thank you. We will now adjourn the meeting of the committee to the committee room in the Capitol and try to reassemble there, as many of us as can, at half past 11. I have already indicated that there are members of the State commissions here who are compelled to leave Washington to-day, and I think it is our duty, no matter how few members can be there, to hear them and put their statements in the record.

(Thereupon, at 11 o'clock a. m., the committee adjourned, to reassemble in the committee room in the Capitol at 11.30 a. m.)

AFTER RECESS.

The committee reassembled in the committee room of the Capitol.

The CHAIRMAN. Who will be heard next, Mr. Benton?

Mr. BENTON. Mr. Slater.

STATEMENT OF MR. H. M. SLATER, RATE EXPERT, ILLINOIS COMMERCE COMMISSION.

The CHAIRMAN. State your name and official position, and your general relation to this subject.

Mr. SLATER. H. M. Slater. Transportation rate expert of the Illinois Commerce Commission. I have been with that commission since the passage of the public utilities act and the inauguration of the commission in the State of Illinois.

I desire to state that I am here at the direction of Col. Frank L. Smith, who regretted exceedingly that he was unable to attend this most important hearing before this committee, and who will at some later date perhaps, if opportunity is granted, communicate direct with the committee in regard to this matter. He has been detained in Illinois.

The commission in Illinois is one of the commissions that did not sign on the dotted line, as contrasted with the statement of the representative of the State of Oklahoma. We were in somewhat of a peculiar position in Illinois, as our State is the dividing line between the major groups prescribed by the Interstate Commerce Commission. The groups were so prescribed by the Interstate Commerce Commission that they overlap in Illinois, the eastern, the western, and the southern groups, so the order of the Interstate Commerce Commission in fixing the percentage advances which should be applied throughout the United States provide for three distinct rate increases on the rates

applicable to interstate traffic to and from points in the State of Illinois. We had rates that were advanced, under the order of the Interstate Commerce Commission, to and from points in Illinois 25 per cent. We had rates prescribed by the same order——

Snator POMERENE (interposing). You are now speaking of interstate rates, are you?

Mr. SLATER. I am speaking of interstate rates at this time.

Senator LA FOLLETTE. Give the dates of those orders as nearly as you can recall them.

Mr. SLATER. The order I name is the order in Ex parte 74, issued on August 11, 1920. The eastern percentage advance of 40 per cent applied on interstate rates to and from points in Illinois to and from points east of the Indiana-Illinois State line. The 35 per cent advance applied on interstate rates from the western group, to and from points in Illinois to and from points west of the Mississippi River.

Senator POMERENE. You spoke of the 25 per cent advance. From what points was that?

Mr. SLATER. All points to and from Illinois on the Louisville & Nashville, Mobile & Ohio, and the Southern Railroad on interstate traffic.

Senator POMERENE. That is the southern group?

Mr. SLATER. Yes; from points in Illinois to that district, or to points in Illinois from that district.

In addition to those three increases fixed by the Interstate Commerce Commission was had in the State of Illinois a percentage increase of 33⅓ per cent, which was interterritorial percentage increase fixed by the Interstate Commerce Commission, so with those percentage increases in the interstate rates in the State of Illinois you might appreciate the difficulty that we were laboring under in endeavoring to reach a proper solution of this matter.

About the time the carriers filed application with the Interstate Commerce Commission for permission to increase their rates due to the increase in wages paid to the employees of the railroads, which had been approved by the Railroad Labor Board, a similar application was filed with the Illinois commission. They did not state definitely the percentage increase that they proposed to make to the rates, but requested the Illinois commission to grant them the same percentage increase that the Interstate Commerce Commission might authorize in the eastern district of the United States, which ulimately was the highest percentage increase fixed anywhere in the United States.

Senator POMERENE. And that was 40 per cent, I believe?

Mr. SLATER. Forty per cent; yes, sir.

Now, in the Congressional Record in 1917—I do not recall the exact date, but I believe some time in December—are shown certain percentages which were found after an investigation conducted by the Interstate Commerce Commission. The New England carriers needed 28.06 per cent. The balance of the official classification territory, which is that territory in the eastern district, or the eastern group, which I will designate as the 40 per cent group, was 15.73 per cent. And in the southern group, which is south of the Ohio and east of the Mississippi Rivers, it was 10.62 per cent. And in the southwestern group 28.07 per cent. While in the western group it was 16.28 per cent. Now, the Interstate Commerce Commission grouped the New England carriers with the balance of the carriers in the 40 per cent group. And bear in mind those two percentages, 28.06 and 15.73, the 28.06 applying exclusively to the New England lines, but in order to determine the percentage increase through this entire district, which embraced New England and the balance of the Central Freight Association territory, or official classification territory, as it is sometimes called, those two were grouped together.

Senator POMERENE. You mean now in fixing the 40 per cent?

Mr. SLATER. In fixing the 40 per cent; yes, sir. Consequently the Interstate Commerce Commission of necessity had to prescribe a higher percentage advance throughout that eastern district than they would have prescribed for the balance of the district had they eliminated the New England lines from that group. There is not a mile of track in the State of Illinois operated by any line that operates in the New England district. So that the percentage of 40 per cent fixed did not embrace exclusively the needs of the carriers in the State of Illinois. As to the southwestern lines, aside from the St. Louis & Southwestern Railroad, there is not a line operating one mile of track in the State of Illinois.

Senator PENROSE. By "line" you mean "company"?

Mr. SLATER. By "line" I mean "company." Now in the Southwest they required 28.07 per cent. In the western district they required 16.28 per cent. Therefore, in determining the percentage increase required in the western group, the percentage of 35 per cent was higher than it would have been had they eliminated the southwestern district. So, again, Illinois getting the 35 per cent advance on interstate traffic was getting a greater increase than it would have otherwise received had the southwestern lines been eliminated from consideration, and they never should have been given consideration in the State of Illinois.

The Illinois commission then conducted hearings and went into this matter very thoroughly. The carriers declined to furnish any data of any kind showing the requirements in the State of Illinois, but they came before the commission with all of the evidence presented to the Interstate Commerce Commission in Ex parte 74. and said to the Illinois commission: "Here is our evidence." It pertained exclusively to interstate traffic, except as to the operating expenses, revenue, and the value of the property, which, of course, embraced both State and interstate. It pertained to railroads that did not operate one mile of track in the State of Illinois. It embraced that in there. They needed a greater increase than the other districts, but it was all in evidence in this case.

We then set about to determine, realizing that an emergency had arisen, what percentage advance should apply to the Illinois intrastate traffic. We considered the matter carefully, and after having considered the four percentage advances applying on traffic to and from points in Illinois, namely, 25, 35, 40, and 33⅓ per cent, we authorized an advance of 33⅓ per cent, which appeared to be the average.

But just before this percentage advance was authorized we had had a number of conferences with the railroad representatives, with shippers in Indiana who were complaining about some of our rates, and with shippers in Wisconsin and Missouri who were not complaining about our rates, and with the Interstate Commerce Commission, and we reached an agreement, and Mr. Maxwell, vice-president of the Wabash, stated that if this scale of rates was put into effect in Illinois it would increase their revenue 36 per cent.

Now, I don't mean to tell you that this scale that we finally adopted and upon which we put these percentage advances, would have produced a like increase. In my judgment it would have produced 20 or 25 per cent. But we gave them that, and that was after the Ex parte 74 decision was issued. On top of that we put a 33⅓ per cent advance on that same scale of rates.

The first order was for the purpose of removing what appeared to be a discrimination, and it was agreed to by the shippers and the railroads, and the Interstate Commerce Commission acquiesced in the agreement and permitted us to make it effective.

I then wired to the Interstate Commerce Commission for a construction of their order. They divided the State of Illinois into two parts, beginning at Chicago and following the Santa Fe Railroad through Peoria, down the Illinois River to its confluence with the Mississippi River; all north of that shall be in the Wisconsin territory; all south of that line shall be in the eastern territory, and the order as written authorized a 40 per cent advance in the southern district of Illinois, 35 per cent advance in the northern district, and the 33⅓ per cent advance between points north and south of the dividing line.

Now, the shippers and railroads alike agreed that that could not stand; that it would create a condition that would necessitate many changes in rates. So I wired for a construction of the order. I thought at the time it was peculiar that they would send out an order that would disturb the rates in Illinois to that extent. In answer to my telegram I got a supplemental order which fixed the rate of advance in Illinois at 40 per cent, the highest they could find in the United states.

Senator POMERENE. That was for intrastate application?

Mr. SLATER. That was for intrastate application; yes sir. That 40 per cent advance that was fixed for Illinois included the southern district of Wisconsin, south of a line drawn through Milwaukee and Madison, Wis., and they set up in that district a new rate group known as the Illinois-rate territory, which they described as the Illinois-freight territory. They did not investigate to determine the requirements of the carriers in that particular group that they had then carved out of the three or four major groups. They did not determine the value of the property devoted to the use in that group. They

did not determine the taxes nor the revenue of the carriers in that group, but said, for the purpose of applying these percentage advances the same percentage advance that is applied in the eastern district shall be applied to Illinois, which meant our rates were advanced to 40 per cent.

Upon receipt of that supplemental order the Illinois commission then gave further consideration to that order they had entered.

Senator POMERENE. Have you a copy of that supplemental order?

Mr. SLATER. Yes, sir.

Senator POMERENE. Introduce it in the record.

Mr. SLATER. I will offer this order for the record.

(The supplemental report of the Interstate Commerce Commission, in Ex parte 74, is as follows:)

INTERSTATE COMMERCE COMMISSION.

EX PARTE 74. IN THE MATTER OF THE APPLICATIONS OF CARRIERS IN OFFICIAL, SOUTHERN, AND WESTERN CLASSIFICATION TERRITORIES FOR AUTHORITY TO INCREASE RATES, DECIDED AUGUST 11, 1920.

1. Supplementing the original report herein, 58 I. C. C., 220, percentage increases authorized upon freight traffic within Illinois territory, and between that territory and points in certain other territories.
2. Carriers authorized, in the publication of passenger fares, to round out fractions to the next whole cent.

SUPPLEMENTAL REPORT OF THE COMMISSION.

By the COMMISSION: Following our original report herein, 58 I. C. C., 220, we were asked to indicate specifically the percentages of increase that should apply to freight rates, (1) within Illinois territory; (2) between points in Illinois territory and points in the eastern group; and (3) between points in Illinois territory and points in the western group.

The State of Illinois is so situated that it may be regarded, for transportation purposes, as partly within eastern territory and partly within western territory. Part of the State is embraced within official classification territory, and on traffic to and from the east the rates are usually governed by the official classification. On the other hand, some of the principal western railroads have their eastern termini within the State of Illinois, and on traffic to and from the west it has been the general practice to regard Illinois as being within western territory. Joint rates between that State and points west of the Mississippi River are governed by western classification. Because of these considerations, among others, the carriers have deemed it advisable to accord to the State of Illinois a basis of rates that partakes in part of the features of the eastern rate structure and in part of the features of the western rate structure.

Illinois territory embraces somewhat more than the State of Illinois proper, and for the purposes of this report may be defined as follows:

"All points in the State of Illinois, also points in Wisconsin on and south of the C. M. & St. P. Ry., Milwaukee to Madison, the C. & N. W. Ry., Madison to Dodgeville, and on and east of the Illinois Central, Dodgeville to the Illinois State line; also points on the west bank of the Mississippi River to which joint through rates subject to the official classification are now in effect from points in trunk line and central territories."

Upon further consideration of the record in this proceeding, we find that in the application of the increases authorized in our original report herein points in Illinois territory should be considered to be within the eastern group for the purpose of applying the increases on interstate traffic between points within Illinois territory; also on traffic between points in Illinois territory on the one hand and points in official classification territory east of the Indiana-Illinois State line on the other, and that an increase of 40 per cent may be made in such rates; and points within said Illinois territory should be treated as being in the western group on traffic subject to joint or single line through rates between points in said territory on the one hand and points lying within the boundaries of the western group (west or north of Illinois territory) on the other, and that an increase of 35 per cent may be made in such rates.

DISPOSITION OF FRACTIONS IN PUBLISHING PASSENGER FARES.

In our original report we said, in effect, that in computing passenger fares the carriers should follow the same rule for the disposition of fractions as was approved for the publication of freight rates where stated in amounts per 100 pounds or any other unit, except as otherwise specifically provided. Our attention is now called to the fact that it has long been the custom of the carriers in constructing passenger fares to round out fractions to the next full cent. It is our view that the practice heretofore observed may be applied in constructing the increased passenger fares, the surcharges for occupants of sleeping and parlor cars, and baggage charges, authorized in our original report.

An appropriate order will be entered.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of August, A. D. 1920.

Ex parte 74. In the matter of the applications of carriers in official, southern, and western classification territories for authority to increase rates. Supplemental order No. 1.

Upon further consideration of the record in the above-entitled proceeding, and for good cause shown:

It is ordered, That in the application of the increases authorized in the report in this proceeding entered July 29, 1920, points in Illinois territory should be considered to be within the eastern group for the purpose of applying the increases on interstate traffic between points within Illinois territory; also on traffic between points in Illinois territory on the one hand and points in official classification territory east of the Indiana-Illinois State line on the other, and that an increase of 40 per cent may be made in such rates; and points within said Illinois territory should be treated as being in the western group on traffic subject to joint or single line through rates between points in said territory on the one hand, and points lying within the boundaries of the western group (west or north of Illinois territory) on the other, and that an increase of 35 per cent may be made in such rates.

For the purposes of this order Illinois territory is defined as consisting of all points in the State of Illinois, also points in Wisconsin on and south of the C. M. & St. P. Ry. Milwaukee to Madison, the C. & N. W. Ry., Madison to Dodgeville, and on and east of the Illinois Central, Dodgeville to the Illinois State line; also points on the west bank of the Mississippi River to which joint through rates, subject to the official classification, are now in effect from points in trunk-line and central territories.

By the commission.

GEORGE B. MCGINTY,
Secretary.

Mr. SLATER. The Illinois commission then gave further consideration to the order which is entered, in which there is an advance of 33⅓ per cent, in addition to that agreed advance that I have stated, to remove an alleged discrimination against Indiana. After considering the matter thoroughly, going over it as completely as possible upon the evidence then before us, which did not then, as I stated, show the requirements of the carriers in that group, we said, "Well, we will increase that 33⅓ per cent and make it 35 per cent." So we authorized the 35 per cent.

Well, immediately after the order of the Illinois commission was entered, the carriers were dissatisfied. They said, "No; we have a chance of getting 40 per cent. Now, why not get it?" That is about the way they felt about it. So they applied to the Interstate Commerce Commission to remove a discrimination, not in the particular rates, but in the percentage advance that had been applied.

The CHAIRMAN. That was the first application the carriers had made to the Interstate Commerce Commission so far as State rates were concerned?

Mr. SLATER. So far as State rates were concerned, that is the first application; yes, sir. Now, the condition was this: They said, "Because you only advanced your rates 35 per cent in Illinois and the carriers operating from the

East into Illinois advanced the rates 40 per cent, a discrimination exists." Thousands of those rates advanced 35 per cent in Illinois were then higher than the interstate rates from the East into Illinois. Completely setting aside the consideration that the rates from the west of the Mississippi River into Illinois were advanced 35 per cent and we put a like advance on them, and in addition to that like advance authorized an increase in our class scale which this 35 per cent advance was applied on top of, losing sight of the fact that there was a percentage increase of 33⅓ per cent, interterritorial percentage increase fixed by the Interstate Commerce Commission. But this is a revenue matter, complete discrimination in the matter of revenue alone, so our rates in Illinois were advanced 40 per cent by the Interstate Commerce Commission.

I want to read to you the concluding portion of the order. It is very important. Concluding, the Interstate Commerce Commission states:

"*It is further ordered*, That this order shall become effective on or before the 7th day of March, 1921, upon notice to this commission and to the general public by not less than five day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of this commission in the premises."

Now, this is the order in which they fixed the State rates in Illinois on a 40 per cent advance.

Senator POMERENE. Give the date of it.

Mr. SLATER. The date of that order is January 11, 1921.

Senator LA FOLLETTE. To go into effect in March.

Mr. SLATER. To become effective on or before the 7th day of March, 1921. I want to emphasize that. The Interstate Commerce Commission said that it shall "remain in force until the further order of this commission in the premises."

Well, immediately after that order was issued the carriers, fearing that the State of Illinois would interfere with the publication of the rates and proceed in the State courts and enjoin them from enforcing the provision of the order, applied to the United States District Court for the Northern District of Illinois, Eastern Division, for an injunction. The case came on to be heard before Judges Baker, Carpenter, and Page, Judge Baker presiding. That was on the 14th day of February, 1921, shortly after this order was entered, within a month after it was entered, and before the tariffs became effective. The court, after listening to the arguments of counsel for both sides, made this statement, which I do not repeat in the exact language as it was given. Judge Baker stated that the railroads of this country, under the transportation act, are now national highways and are under the exclusive jurisdiction of the Government. If the States should be permitted to regulate the State rates, they may as well be permitted to tax the Federal banks. He pointed out to us that the regulation of State rates amounted to the same as taxing a Federal bank.

And this was the order that was entered against the State of Illinois—of course, it enjoins all State authorities, the commissioners individually, and the Illinois commission and their successors, etc., in the same language used in bills of this kind: "Absolutely desist and refrain from commencing any suit or proceeding to enforce or attempt to enforce the provisions of the said statutes of the State of Illinois, being sections 33, 34, 35, 36, 37, 75, 76, 77, 78, and 79 of chapter 111(a) of the revised statutes of Illinois (Hurd's R. S., 1917), or the said orders of the said public utilities commission entered on August 10, 1920, and October 18, 1920, alleged to be issued, in pursuance of the said statutes, against plaintiffs and each of them, their officers, agents, servants, and employees, on account of plaintiffs putting into effect and charging and collecting within the State of Illinois intrastate freight rates and charges as established pursuant to said report and orders of said Interstate Commerce Commission dated January 11, 1921, and January 31, 1921, in its docket No. 11703, entitled 'In the matter of intrastate rates within the State of Illinois.'"

Senator POMERENE. Will you let me suggest that you incorporate the entire order.

Mr. SLATER. I will offer the entire order for the record.

The CHAIRMAN. It may go in.

(The order for interlocutory injunction, dated February 14, 1921, is as follows:)

In the district court of the United States, northern district of Illinois, eastern division.

Illinois Central Railroad Co., and other railroads, *v.* Public Utilities Commission of the State of Illinois et al. In equity. Nos. 1900–1916, both inclusive; 1919–1922, both inclusive; 1924–1926, both inclusive; 1928–1930, both inclusive; 1956–1960, both inclusive; 1962–1967, both inclusive.

ORDER FOR INTERLOCUTORY INJUNCTION.

The application of plaintiffs for interlocutory injunction in each of the above-entitled cases having come on to be heard and determined this 14th day of February, 1921, by the Hon. Francis E. Baker and the Hon. George T. Page, circuit judges, and the Hon. George A. Carpenter, district judge, and it appearing to the court that five days' notice of said hearing has been duly given to the governor and the attorney general of the State of Illinois and to all defendants in each of said causes, as provided by law, and the court having heard the arguments of counsel: It is therefore ordered:

First. That the statutes of the State of Illinois, known as the public utilities law of Illinois, being sections 33, 34, 35, 36, 37, 75, 76, 77, 78, and 79 of chapter 111 (a) of the Revised Statutes of Illinois (Hurd's R. S., 1917), and the reports and orders of the Public Utilities Commission of Illinois made pursuant thereto, being the orders of the State public utilities commission entered on August 10, 1920, and October 18, 1920, are in conflict with the report and orders of the Interstate Commerce Commission dated January 11, 1921, and January 31, 1921, in its docket No. 11703, entitled "In the matter of intrastate rates within the State of Illinois," and that the enforcement, operation, and execution of said State statutes and the said orders of the State public utilities commission, and each of them, against the plaintiffs and each of them, their officers, agents, servants, and employees, on account of putting into effect, charging, and collecting the intrastate rates, fares, and charges established in the State of Illinois pursuant to said report and orders of said Interstate Commerce Commission, be restrained pending the final hearing of this cause.

Second. That the defendants, the Public Utilities Commission of the State of Illinois, and Thomas E. Dempcy, Cicero J. Lindly, Patrick H. Moynihan, Hal W. Trovillion, and James F. Sullivan, individually and as members of the Public Utilties Commission of Illinois; Edward J. Brundage, individually and as attorney general of Illinois; and Robert E. Crowe, individually and as State attorney of Cook County, Ill., and in each of said causes the State attorneys therein named, and each of them, their successors in office, their agents, servants, employees, and other persons acting under the control or authority of any or all of said defendants, absolutely desist and refrain from commencing any suit or proceeding to enforce or attempt to enforce the provisions of the said statutes of the State of Illinois, being sections 33, 34, 35, 36, 37, 75, 76, 77 78, and 79 of chapter 111 (a) of the Revised Statutes of Illinois (Hurd's R. S., 1917), or the said orders of the said public utilities commission entered on August 10, 1920, and October 18, 1920, alleged to be issued, in pursuance of the said statutes, against plaintiffs and each of them, their officers, agents, servants, and employees, on account of plaintiff's putting into effect and charging and collecting within the State of Illinois intrastate freight rates and charges as established pursuant to said report and orders of said Interstate Commerce Commission, dated January 11, 1921, and January 31, 1921, in its Docket No. 11703, entitled "In the matter of intrastate rates within the State of Illinois," and from arresting, molesting, or otherwise interfering with the officers, agents, servants, or employees of the plaintiffs, or any of them, or doing any other act under said statutes of the State of Illinois which would prevent or tend to prevent plaintiffs, or any of them, their officers, agents servants, or employees, from putting into effect, charging, and collecting in the State of Illinois the aforesaid intrastate rates and charges established pursuant to said orders of said Interstate Commerce Commission; and from instituting any suits or proceedings under the statutes of the State of Illinois against the plaintiffs, or any of them, their officers, agents, servants, or employees, on account of the aforesaid intrastate rates and charges so established pursuant to said orders of said Interstate Commerce Commission having put into effect, charged, or collected, and from ordering, seeking, aiding, or abetting in any manner whatsoever, any person or persons to commit any or

either of the acts aforesaid until the final hearing of these causes or until the further order of this court.

Ordered this 14th day of February, 1921.

FRANCIS E. BAKER,
GEORGE T. PAGE,
GEORGE A. CARPENTER,
Judges.

Mr. SLATER. Now, the effect of that order is this: That the State commission is enjoined from proceeding under the statutes to determine and fix the intrastate rates in the State of Illinois. We are absolutely enjoined from commencing any suit or proceeding in any manner, from taking evidence in the case, from making any recommendation, because we can not proceed. So, to-day, we have in the State of Illinois a State commission without authority to touch the railroad rates in the State of Illinois.

Senator POMERENE. Have you taken an appeal in that case?

Mr. SLATER. That has been appealed to the United States Supreme Court; yes, sir. It has not been argued there.

The CHAIRMAN. It has not yet been argued?

Mr. SLATER. It has not yet been argued; no, sir. Now, what happened?

Mr. BENTON. Mr. Slater, may I interject an inquiry as to whether the record has been printed, and whether you know anything about the requirement of the printing of Ex parte 74 or not?

Mr. SLATER. Whether the record in this case has been printed?

Mr. BENTON. In the Illinois case?

Mr. SLATER. No; we have had some difficulty. That is a very expensive proposition. I don't know who has the money to print it. We have not an appropriation to print the Ex parte 74, and I don't know of any State that has. And it is a very voluminous record. I don't know how they are going to get it up to the United States Supreme Court.

The CHAIRMAN. All the evidence that was offered?

Mr. SLATER. All the evidence that was offered before the Interstate Commerce Commission, and it is a vast amount of evidence.

Mr. BENTON. The carriers insisting that you print the entire record in Ex parte 74?

Mr. SLATER. Yes: the carriers insisting that we print the entire record in Ex parte 74.

Senator POMERENE. What would it amount to? Give the committee some idea as to the number of pages in the record.

Mr. SLATER. $15,000 or $20,000. It would amount to between $15,000 and $20,000.

The CHAIRMAN. Was that testimony introduced in the injunction suit?

Mr. SLATER. Yes, sir: it was. All of the evidence was introduced.

The CHAIRMAN. On what theory?

Mr. SLATER. To prevent duplication of matters. The carriers contended that there had been evidence introduced in the Illinois case. We contended that there had been no evidence introduced in the Illinois case showing the requirements of the carriers in the State of Illinois. So in order to show that no evidence had been put in showing the operating expenses, the taxes, the revenues derived from State traffic, here is the record.

The CHAIRMAN. Did counsel object to the introduction of that record?

Mr. SLATER. There was no objection to the introduction of it at that time.

The CHAIRMAN. Well, it does not seem to me that it was competent testimony. I can not understand how it became competent testimony.

Mr. BENTON. Senator, may I state the situation as to that, with the consent of Mr. Slater?

The CHAIRMAN. Yes.

Mr. BENTON. While the Illinois and the New York cases were being argued before the Interstate Commerce Commission preparatory to the making of orders fixing the intrastate rates by the Interstate Commerce Commission, after the evidence had been taken before the examiners, upon which the arguments were had, the Ex parte 74 record was inquired about by a commissioner and tendered by the carrier representatives. The assistant attorney general of Illinois objected to its being incorporated in the record, as I now remember. It is also my recollection that in that case, which is the first

time it was offered, I raised the question of the tremendous expense that would be involved in the printing of it if a court review of any order that the Interstate Commerce Commission might make should be held, and it was over that objection that the Interstate Commerce Commission admitted it into this proceeding. And this Illinois proceeding being one where the validity of the Interstate Commerce Commission's order came in question, I assume that the Government and the railroads contended there, as they did in the New York case, that the record in Ex parte 74 was a necessary part of the court record in order that the court might pass upon the validity of the order that the Interstate Commerce Commission had made, and I will say that that question has been seriously pressed upon the Supreme Court, and it has been claimed in the New York case that there can be no decision in the New York case because the Ex parte 74 record has not been printed and taken up.

Senator POMERENE. Well, as I understand the rules of practice, it would only be necessary to have such parts of this record which might indicate the legal questions involved.

The CHAIRMAN. This is an equity case.

Senator POINDEXTER. There is just one question I would like to ask this witness. May I ask you this question, please? I don't know whether you are familiar with it at all or not, but I was very much interested in the statement that the chairman of the Oklahoma commission made this morning. He stated that when the Oklahoma commission undertook to regulate intrastate rates at a time prior to the taking over of the roads by the Government they were enjoined by a Federal court. He said he did not know what became of that case. Are you familiar with that at all or have you any idea as to the grounds on which the court acted and whether or not there was any principle of law establishing in that case that the State commission had no jurisdiction over intrastate rates?

Mr. BENTON. I think that that injunction was granted, either temporarily or permanently, on the ground that the schedule of rates which Oklahoma was then insisting upon was confiscatory.

Mr. RUSSELL. That is correct.

Mr. BENTON. And an injunction issued restraining the State from enforcing its State or commission orders. And the carriers then put into effect a schedule of rates which they deemed best suited to their own interests and to the traffic that they transported.

The CHAIRMAN. To come back to this other point. The carriers finally reached the Interstate Commerce Commission with the case against the commissioners of Illinois?

Mr. SLATER. Yes, sir.

The CHAIRMAN. With a view to establishing discrimination in the intrastate rates then in force?

Mr. SLATER. Yes, sir.

The CHAIRMAN. But I can not imagine how, the State of Illinois not having been a party to Ex parte 74 in any way, the testimony taken in that case could be held, either by the Interstate Commerce Commission or by a court, to be competent evidence against the State of Illinois. I do not understand that a bit.

Mr. JACKSON. I do not either, but I would like to give the circumstances in regard to the Illinois case. We argued it all one day before the Interstate Commerce Commission.

Mr. BENTON. Illinois or Wisconsin?

Mr. JACKSON. Wisconsin. We argued it all one day before the Interstate Commerce Commission. At 3 o'clock in the afternoon the chairman of the Interstate Commerce Commission, without any request from the carriers at all, inserted in the record all of the evidence in Ex parte 74 and insisted upon its being there over my strenuous objection on the record.

The CHAIRMAN. Well, the Interstate Commerce Commission is not a judicial body, and possibly it may have some latitude in connection with the introduction of evidence, but how a court could come to the conclusion, when it came into the court, that the testimony taken in a case to which the State of Illinois was not a party nor connected in any wise, was competent evidence against the State, I do not understand. I can not conceive how that could come about.

Mr. SLATER. Well, it is all there. I don't know how it happened.

Senator LA FOLLETTE. And it went in, as I understand, over the objection that you interposed, Mr. Benton?

Mr. BENTON. The objection was interposed by the Assistant Attorney General.

Senator LA FOLLETTE. Yes.

Mr. BENTON. And I was studying the situation on behalf of the commissions generally.

Mr. RUSSELL. May I just interrupt to say that in the trial of the Oklahoma case this was all introduced over the objection of the State, and the commissioner smilingly said to us, "You will have some good reading matter for the summer."

The CHAIRMAN. This is getting to be a rather disorderly state of affairs.

Senator LA FOLLETTE. That seems to be a handy record for those gentlemen to pass around.

Senator POMERENE. Before you go on with your statement, there is one question I want to ask so as to clear up the matter. In the early part of your statement you said in substance this, that the Interstate Commerce Commission had made these orders for increases of 40 per cent, 25 per cent, 35 per cent, and 33⅓ per cent for intrastate.

Mr. SLATER. For interstate.

Senator POMERENE. Thirty-three and one-third per cent for intrastate?

Mr. SLATER. No; for interstate. All of those were interstate percentage advances.

Senator POMERENE. Well, be that as it may, but I was attracted by one statement that you made, which was to the effect that the Interstate Commerce Commission made these orders without having taken into consideration the matter of wages or taxes or other expenses. Now, upon what facts do you base that conclusion? Of course it is your own conclusion.

Mr. SLATER. No; that is a mistake. I perhaps did not make myself clear. The Interstate Commerce Commission in fixing those percentages that you have related on interstate traffic, did give consideration to the value of the property, the operating expenses and taxes of the carriers, namely, the interstate percentage of advances that were applied on interstate traffic to and from points in Illinois, of 25 per cent, 33⅓ per cent, 35 per cent, and 40 per cent. But when they determined the percentage advance that should be applied on traffic wholly within the State of Illinois, of 40 per cent, they did not have before them, nor did the Illinois commission at any time have before them, the operating expenses of the carriers within the State of Illinois, the taxes of the carriers within the State of Illinois, or the operating revenue of the carriers within the State of Illinois. In fixing the 40 per cent advance they had no information before them as to the requirements of the carriers in that particular district that had been carved out of the three major groups fixed by the Interstate Commerce Commission. At no time did the Interstate Commerce Commission have that information before it.

Senator POMERENE. Was there any such thing in this record, Ex parte 74?

Mr. SLATER. Not at all, except they took into consideration this: The New England lines were grouped with the lines that operated through the official classification territory. Not one of the New England lines operates through Illinois. But they were grouped together. And all interstate revenues and expenses were grouped together. So they had nothing at all in the State of Illinois that would show the requirements of the carriers in that district. Have I made myself clear on that?

Senator POMERENE. I understand your position.

Mr. SLATER. Yes. Now, keeping in mind that the order of the Interstate Commerce Commission provided that these rates shall remain in effect until the further order of the commission, and besides that order issued by the Interstate Commerce Commission, the State was enjoined from proceeding under the statutes of the State of Illinois to control any rates of any kind of any of the carriers, by this injunction, there was no one in the State of Illinois, and no authority in the State of Illinois that could give consideration to complaints of shippers or to petitions of carriers for increases in rates.

But our coal people applied to the Interstate Commerce Commission, or complained to the Interstate Commerce Commission concerning the coal rates, both State and interstate, alleging that due to the percentage increase that had been applied to the rates, the relationship between the groups had been disturbed to the extent that a discrimination existed. The evidence was all presented to the Interstate Commerce Commission in cases Nos. 10783, 10815, 11091, and 11149. On July 7, 1921, this past July, the Interstate Commerce Commission entered an order and found that a discrimination existed, that the groups had

been disturbed to the point that a discrimination existed between the groups on coal rates applying from mines in the State of Illinois to points in adjoining States. I want to read to you just one part of this order of the Interstate Commerce Commission:

"The complaints, all of which were filed prior to the termination of Federal control, assail as unreasonable and unduly prejudicial the rates on bituminous coal from various groups of mines in the State of Illinois to points in Illinois, Indiana, Iowa, Minnesota, Wisconsin, Michigan, Nebraska, Kansas, North Dakota, South Dakota, and Missouri. Since intrastate rates are not subject to our jurisdiction, excepting under conditions not here present, interstate rates only will be considered."

Take the two orders together. One says that these rates shall be advanced 40 per cent; the other that they shall remain in effect until the further order of this commission.

Later, on July 7, 1921, upon a complaint filed by the coal people of Illinois, several complaints, they say, "We have no jurisdiction." Now, where will these coal people go? They come to the Illinois commission. We hand them the injunction. We say, "Read it. We are enjoined from proceeding under the statutes of the State of Illinois. We can not give you any relief." We have been down to the Interstate Commerce Commission. Here is our order. They fixed the interstate rates. They changed all the interstate rates under this order from Illinois to points in the adjoining States, but declined to touch the State rates in the State of Illinois. So to-day in the State of Illinois there is no one who has the right or authority to change the State rates upon any complaint of any shipper or upon a petition of a carrier for increases or reductions. We are completely enjoined. The Interstate Commerce Commission refuses to act and the court has enjoined us. Now our shippers come to us with these complaints, and we read them.

Senator POMERENE. Would it not be well to put that order in the record?

Mr. SLATER. Yes. I will present this for the record.

The CHAIRMAN. It may go in.

(The report of the Interstate Commerce Commission in the Illinois coal cases is as follows:)

[7048. Interstate Commerce Commission. The Illinois Coal cases, 1920. No. 10783, Coal Trade Bureau of Illinois *v.* Director General, Chicago, Burlington & Quincy Railroad Co., et al. No. 10815, Spring Valley Coal Co., et al. *v.* Director General, as agent, Atchison, Topeka & Santa Fe Railway Co., et al. No. 11091, Central Illinois Coal Traffic Bureau *v.* Director General, Atchison, Topeka & Santa Fe Railway Co., et al. No. 11149, Fifth and Ninth Districts Coal Bureau *v.* Director General, Atchison, Topeka & Santa Fe Railway Co., et al. Submitted December 16, 1920. Decided July 7, 1921.]

Upon complaints assailing as unreasonable, unjustly discriminatory, and unduly prejudicial the rates on bituminous coal from mines in the Fulton-Peoria, Third Vein, Springfield and Belleville districts and from the so-called inner group, all in Illinois, to destinations in Illinois, Indiana, Iowa, Minnesota, Wisconsin, Michigan, Nebraska, Kansas, North Dakota, South Dakota, and Mssouri, *Held:*

1. That the rates from the Third Vein, Springfield and Belleville districts to the Northwest are unduly prejudicial, to the extent that they are less than 70 cents, 30 cents, and 10 cents lower per ton, respectively, than the rates from the southern Illinois district to the same territory of destination.

2. That the rates from the Fulton-Peoria district to certain points in Iowa are unduly prejudicial to the extent that they are less than 70 cents and 40 cents lower per ton than the rates from the southern Illinois and Springfield districts, respectively, to the same destinations.

3. That the rates from mines in the inner group to St. Louis and points in Missouri and southern Iowa, except Missouri River cities, to which the traffic moves through St. Louis, are unduly prejudicial to the extent that they are less than 22.5 cents lower per ton than the rates contemporaneously maintained from mines in the southern Illinois group to the same destinations.

George C. Gale and James A. Fenelon for complainant in No. 10783; John S. Burchmore and Luther M. Walter for complainants in Nos. 10815 and 11149; and Stanley B. Houck and W. A. Holley for complainant in No. 11091.

A. P. Humberg, C. P. Stewart, Kenneth F. Burgess, F. H. Towner, K. L. Richmond, and Edward D. Mohr for Director General of Railroads; A. P. Humberg for Illinois Central Railroad Co.; N. S. Brown for Wabash Railroad Co.; C. P. Stewart for Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; H. G. Herbel and C. C. P. Rausch for Missouri Pacific Railroad Co.; Kenneth F. Burgess and Bruce Scott for Chicago, Burlington & Quincy Railroad Co.; Frank H. Towner and Silas H. Strawn for Chicago & Alton Railroad Co.; K. L. Richmond for Chicago & Eastern Illinois Railroad Co.; Edward D. Mohr for Louisville & Nashville Railroad Co.; H. L. Walker and Charles J. Rixey, jr., for Southern Railway Co.; W. M. Hopkins for Springfield Terminal Railroad Co.; and C. H. Ashar for Baltimore & Ohio Railroad Co., defendants.

W. A. Holley for Northwestern Traffic & Service Bureau; Samuel D. Royse, Jonas Waffle, and C. B. Cardy for Indiana Coal Trade Bureau, Knox County Coal Operators' Association, and Southern Indiana Coal Bureau; R. W. Ropiequet, F. H. Harwood, and C. B. Cardy for Coal Operators' Association and Illinois Coal Traffic Bureau; Frank Lyon for Northwestern Coal Dock Operators Association; George Heaps, jr., and Frank V. Dole for Iowa Coal Operators Association; H. G. Denison for Roundup Coal Mining Co.; Thomas L. Phillips and C. E. Warner for Southwestern Interstate Coal Operators Association; J. H. Tedrow for Chamber of Commerce of Kansas City, Mo.; H. J. Smith for city of Kansas City, Kans.; and E. M. Harber for city of Kansas City, Mo., interveners.

REPORT OF THE COMMISSION.

By the commission: These cases are related and will be disposed of in one report. Proposed reports were served upon the parties, exceptions were filed, and oral argument has been had in Nos. 10815, 11091, and 11149.

The complaints, all of which were filed prior to the termination of Federal control, assail as unreasonable and unduly prejudicial the rates on bituminous coal from various groups of mines in the State of Illinois to points in Illinois, Indiana, Iowa, Minnesota, Wisconsin, Michigan, Nebraska, Kansas, North Dakota, South Dakota, and Missouri. Since intrastate rates are not subject to our jurisdiction, excepting under conditions not here present, interstate rates only will be considered. Although unreasonableness and in certain instances unjust discrimination are alleged, the outstanding issue is that of alleged undue prejudice in the relationship of rates between the southern Illinois district and the other important coal-producing districts of that State. Substantially the same rate situation was before us in the Illinois Coal Cases (32 I. C. C., 659). Rates and differentials are stated herein in amounts per net ton, and, except as otherwise noted, do not include the general increases of 1920.

The complaints were filed by or on behalf of coal operators in the Third Vein, Fulton-Peoria, Springfield, and Belleville districts and the so-called inner group, in Illinois, hereinafter more fully described. The Illinois coal traffic bureau representing operators in the southern Illinois district intervened in opposition to the complaints. Other opposing interventions were made on behalf of operators in Indiana, Iowa, and other States. Certain dock operators were also permitted to intervene.

The coal mines in Illinois have been grouped for rate-making purposes for about 34 years. In the northern part of the State are the Wilmington, Third Vein, and Fulton-Peoria districts. The Springfield district in central Illinois is the largest in point of area and includes mines in Sangamon, Christian, Macoupin, Logan, Menard, Moultrie, Shelby, Montgomery, and Madison Counties. To the south of the Springfield district and [illegible] east of East St. Louis is the Belleville district. [illegible] the southern Illinois [illegible] and Gallatin Counties [illegible] Perry County. [illegible] ville field is a smaller group [illegible] a small group in the eastern part of the State [illegible] various districts are described [illegible] and their locations are shown on a map on page [illegible] stated, the present grouping is the outgrowth of [illegible] known as the [illegible] northern Illinois field [illegible]

districts, was given the Chicago rate to points in northern Illinois, Wisconsin, Iowa, Minesota, North Dakota, and South Dakota, and this rate was used as the base rate in determining differentials to be applied from the other groups.

The rate system then established was modified from time to time as the various fields developed. Immediately prior to the general increases of August 26, 1920, the general basis for rates from the Illinois groups to the Northwest was as follows: Springfield district, 40 cents over northern Illinois; Centralia and Belleville, 60 cents over northern Illinois and 20 cents over Springfield; southern Illinois, 70 cents over northern Illinois, 30 cents over Springfield, and 10 cents over Belleville. These differentials, however, were not uniformly observed, but were departed from at certain points in the territory covered by the complainants. Furthermore, it is to be noted that the uniform increase of 35 per cent applied to these rates under Increased Rates, 1920 (58 I. C. C., 220); Authority to Increase Rates (58 I. C. C., 302) had the effect of widening these differentials.

The western portion of the State of Indiana is also underlaid with extensive deposits of coal. The producing areas in that State are grouped for rate-making purposes, and are differentially related to northern Illinois. Farther to the south are the western Kentucky fields, described in Ohio Valley Coal Operators Asso. *v.* I. C. R. R. Co. (53 I. C. C., 148). Rates from mines in those fields to Chicago and the Northwest and to St. Louis are related differentially to the rates from southern Illinois to the same destination territory.

For convenient reference the rates assailed may be divided as follows: (1) Interstate rates to the Chicago district and to the territory north and west thereof hereinafter called the Northwest; (2) rates to St. Louis, Mo.; (3) rates to the territory west of St. Louis; and (4) rates to Kansas City, Mo. Rates to the Northwest are assailed in each of the complaints and will be considered first.

RATES TO THE NORTHWEST.

Different rates are maintained on coal moving via the several routes, although uniform rates are applicable via the principal routes. The rates on lump and fine coal via a majority of the routes, and average distances from the Springfield district and southern Illinois fields to representative destinations are shown in the following table:

To—	Average distances via short route.			Average distances via all routes.			Rates.					
	Springfield district.	Southern Illinois district.	Difference.	Springfield district.	Southern Illinois district.	Difference.	Springfield district.		Southern Illinois district.		Differential.	
							Lump.	Fine.	Lump.	Fine.	Lump.	Fine.
	Miles.	*Miles.*	*Miles.*	*Miles.*	*Miles.*	*Miles.*						
Chicago, Ill.	191	308	117	237	354	117	$1.31	$1.31	$1.55	$1.55	$0.24	$0.24
Rockford, Ill.	196	330	134	275	416	141	1.52	1.52	1.72	1.72	.20	.20
Madison, Wis.	269	399	130	333	460	127	1.80	1.80	2.00	2.00	.20	.20
La Crosse, Wis.	389	510	121	462	594	132	2.35	2.35	2.65	2.65	.30	.30
St. Paul, Minn.	497	641	144	594	742	148	2.55	2.41	2.85	2.71	.30	.30
Burlington, Iowa	153	337	184	184	366	182	1.55	1.40	1.90	1.90	.35	.50
Davenport, Iowa	169	314	145	203	356	153	1.60	1.425	1.85	1.70	.25	.275
Clinton, Iowa	194	329	135	233	368	135	1.60	1.425	1.85	1.70	.25	.275
Dubuque, Iowa	246	399	153	326	451	125	1.85	1.85	2.05	2.05	.20	.20
Cedar Rapids, Iowa	248	387	139	333	484	151	2.54	2.165	2.80	2.44	.26	.275
Fort Dodge, Iowa	410	528	118	500	625	125	2.80	2.661	3.10	2.936	.30	.275

Rates from the Belleville district to representative points in the Northwest and to Chicago are shown in the following table. Where the rates do not uniformly apply over the various routes the rate applicable over a majority of the routes has been selected. The distances shown are the average distances from the mines via the short route, and the average distances from all mines via all routes over which the rates are applicable.

To—	Distances.				Rates.		Differentials.
	Belleville group.		Southern Illinois group.		Belleville group.	Southern Illinois group.	
	Via short routes.	Via all routes.	Via short routes.	Via all routes.			
	Miles.	*Miles.*	*Miles.*	*Miles.*	*Cents.*	*Cents.*	*Cents.*
Davenport, Iowa	259	278	311	357	170	185	15
Iowa City, Iowa	318	332	364	405	250	265	15
Des Moines, Iowa	357	474	437	520	260	275	15
Fort Dodge, Iowa	443	554	518	605	300	310	10
Mason City, Iowa	476	568	521	609	275	285	10
La Crosse, Wis	457	516	520	597	255	265	10
Wausau, Wis	528	569	573	655	260	270	10
Albert Lea, Minn	494	568	540	614	275	285	10
Mankato, Minn	575	655	635	705	275	285	10
Minneapolis, Minn	602	663	652	728	275	285	10
Aberdeen, S. Dak	858	916	892	960	380	390	10
Milwaukee, Wis	370	419	388	465	197	205	8
Chicago, Ill	277	306	303	369	147	155	8

Rates from the Third Vein and southern Illinois groups to representative destinations as compared with rates in effect in 1910, and illustrating the effect of the various general increases since that date, except those of 1920, are shown in the following table:

To—	From Third Vein group.			From Southern Illinois group.			Comparison.	
	Rate in 1910.	Present rate.	Increase.	Rate in 1910.	Present rate.	Increase.	Rate.[1]	Differential.[2]
	Cents.	*Cents.*	*Per cent.*	*Cents.*	*Cents.*	*Per cent.*	*Cents.*	*Cents.*
Minneapolis, Minn	140	215	53.6	210	285	35.7	322	37
Granite Falls, Minn	232	292	25.9	302	367	21.5	390	13
Mankato, Minn	150	215	43.3	220	285	29.5	317	32
Wausau, Wis	140	200	42.9	210	270	28.6	300	30
La Crosse, Wis	135	195	44.5	205	265	29.3	296	31
Fond du Lac, Wis	135	195	44.5	205	265	29.3	296	31
Milwaukee, Wis	85	135	58.8	148	205	38.5	235	30
Madison, Wis	100	150	50	150	200	33.3	225	25
Janesville, Wis	80	130	58.9	150	200	33.3	228	38
Dubuque, Iowa	110	165	50	150	205	36.6	225	20
Clinton, Iowa	85	140	64.7	130	185	42.3	214.1	29
Davenport, Iowa	75	130	73.4	130	185	42.3	225.4	40
Cedar Rapids, Iowa	140	215	53.6	215	280	30.2	330.2	50
Des Moines, Iowa	160	235	46.9	200	275	37.5	293.8	19
Fort Dodge, Iowa	185	240	29.7	255	310	21.6	330	20
Sioux City, Iowa	240	305	27.1	294	369	25.5	374	5

[1] Rates that would result from the southern Illinois group at same percentage of increase as from the Third Vein group.

[2] Difference between the present differential and the differential that would result from the same percentage of increase from the southern Illinois group as the Third Vein group.

The average distance from southern Illinois mines to Chicago via all routes is 117 miles in excess of the average distance from the Springfield mines. The corresponding differences in the average haul to the Mississippi River crossings range from 125 to 182 miles. The average distance from the southern Illinois district to representative destinations via the short routes is from 24 to 80 miles in excess of the average distance from the Belleville group, the differences in a majority of cases being [illegible] 50 miles. At Chicago and Milwaukee the differences are considerably less. On the average the haul from southern Illinois exceeds that from the Third Vein group, the Springfield district, and the Belleville group by 2[illegible] miles, [illegible] 50 miles, respectively.

In No. 10815 operators in the Third Vein field contend that their prevailing differential of 70 cents over southern Illinois should be increased to $1.50. In No. 11051 operators in the Springfield district who now have a differential of

30 cents under southern Illinois contend that a minimum reasonable differential would be 60 cents, but ask us to prescribe differentials ranging from 44 cents at St. Paul to 93 cents at Davenport. A differential of 40 cents is suggested by certain of the defendants, while other defendants contend that the present differential should not be disturbed. In No. 11149 the Belleville district operators assail their present differential of 10 cents under southern Illinois. Although 10 cents is the usual differential it is not in effect at all points. For example, the difference is 15 cents at Cedar Rapids, except on lump coal originating in the Belleville district on the Illinois Central, and 15 cents at Des Moines, Oskaloosa, and Ottumwa, Iowa. In No. 10783 operators in the Fulton-Peoria district do not seek to widen their present differential of 70 cents under southern Illinois, but they desire the restoration of that differential where it has been departed from under circumstances hereinafter described. The only interstate rates assailed in the latter complaint are those to certain destinations in Iowa.

The following table shows the present differentials, those sought by the respective complainants, and the approximate differences in distances from the various groups:

District.	Present differential under southern Illinois.	Differential sought.	Average difference in distance.
	Cents.	*Cents.*	*Miles.*
Third Vein	70	150	200
Springfield	30	44 to 93	125
Belleville	10 to 15	25 to 35	50
Fulton-Peoria	.....	70	.....

In the Illinois Coal cases (supra), we declined to widen the differentials here assailed. Thereafter the rates were increased generally 10 cents as authorized in 1915 Western Rate Advance case (35 I. C. C., 497), 15 cents as authorized in the Fifteen Per Cent case (45 I. C. C., 303), and by various amounts pursuant to general order No. 28 of the Director General of Railroads. Where groups were related by fixed differentials the increases provided by the latter order from the highest rated group were applied from all groups. Consequently, geater percentage increases were made in the rates from the Third Vein, Springfield, and Belleville groups than from southern Illinois. The preceding table showing the rates from the Third Vein and southern Illinois groups sets forth the respective percentages of increases since 1910. It is contended that by reason of these general increases conditions have changed since our decision in the Illinois Coal cases (supra), that the value of the differentials there approved has been lessened by the increased cost of production and selling prices; and that the differentials should have been increased when the rates were increased. The question of horizontal versus percentage increases in rates on coal was before us in Increased Rates, 1920 (supra), where we said, at page 248:

"Carriers serving the Pennsylvania-Ohio-West Virginia coal fields propose to continue the existing differentials in coal rates, and have worked out a scheme of rates to effect that result. Carriers in the southern and western groups propose to ignore existing differentials in coal rates within those groups. The proposal of the eastern lines to preserve existing relationships is approved, and carriers in the other groups should work out a similar plan for restoring the relative adjustments of coal rates now obtaining in those groups. An effort should be made promptly to devise rates in each group that will yield, as nearly as practicable, the same revenue in the aggregate as would be afforded by a straight percentage increase on the bases herein approved."

The principle above stated has been adhered to in Coal from Kentucky, Tennessee, and Virginia (60 I. C. C., 166). The differentials of which complaint is here made can not be condemned solely on the ground that when measured by the volume of the rates they are relatively less than formerly.

It is apparently conceded that commercial competition was given careful consideration when the differentials between the various Illinois groups were originally established. Respecting this we said in the Illinois Coal Cases (supra), at page 667:

"It is asserted of record that the differentials were not based on transportation conditions and were established without reference to transportation costs as between the several fields but to meet commercial conditions and to put all these coals on a reasonably equal competitive basis. So carefully in fact have the quality of coal, thickness or seam, wage scale, cost of mining, competition of other fields, etc., been taken into consideration in working out the present relationships between these fields that the statement was made on the argument that the consumers of the various coals in the northwest pay practically the same price for transportation per thermal unit, regardless of the mines from which they are shipped."

In 1887 the northern Illinois field produced 3,300,000 tons, or about one-third of the total production of the State. The output of the Springfield district, as originally established, was at that time about 1,750,000 tons a year, and that of the mines at Mount Olive, Staunton, and Worden, in Illinois, about 1,000,000 tons. The annual production in the Belleville district was about 1,500,000 tons and that of Perry and Williamson counties, then comprising the southern Illinois field, was about 1,000,000 tons. In 1903 the coal production of northern Illinois began to decline and in 1912 that section produced only 528,000 tons of comercial coal, while in the latter year southern Illinois produced 15,000,000 tons, or about 30 per cent of the entire tonnage of the State. Our report in the Illinois Coal Cases (supra) contains figures showing the variations in the production of the Illinois districts up to the date of decision in those cases. The following table shows the tonnage produced in representative years since that time:

	1915	1916	1918	1919
	Tons.	*Tons.*	*Tons.*	*Tons.*
Entire State	56,172,556	62,283,236	88,306,200	73,751,721
Northern Illinois (Wilmington and Third Vein)	4,322,128	4,305,539	4,251,561	3,155,901
Springfield	19,248,440	20,349,850	29,693,978	23,819,542
Belleville	5,371,745	6,082,885	11,530,546	9,372,451
Southern Illinois (including Du Quoin)	21,137,637	24,802,611	33,455,831	30,058,597

Less coal was produced in Illinois during the year ended June 30, 1919, than in the preceding year, but the decrease in production was relatively less in southern Illinois, so that the ratio of its output to that of the entire State was greater than in any previous year. The decline in production in the Third Vein field, noted in our report in the Illinois Coal Cases (supra) continued thereafter. In 1917–18 the tonnage produced in that field was only 4.6 per cent of the total output for the State. In recent years operators in that field have been practically eliminated from most of the territory involved in these cases, except eastern Iowa and southern Wisconsin. Most of their coal is sold at points in northern Illinois, exclusive of Chicago, from which market they are practically shut out, though, with one exception, they have an advantage in distance over all other Illinois groups. Their situation is alleged by them to be due principally to competition from southern Illinois mines as well as from dock coal brought via the Lakes from eastern mines during the summer months. Only a small percentage of the coal in the Third Vein field has been mined, and it is stated that if market conditions were favorable the production of the district could be increased considerably. Similar evidence was introduced on behalf of the Springfield operators. It is pointed out that in 1905 there were 93 mines in operation in the Springfield district, compared with 69 in southern Illinois, while in 1918 there were only 79 producing mines in the Springfield district, as against 114 in southern Illinois.

The coal mined in southern Illinois is superior in quality to that produced in the other groups. Analyses show that 1 pound of Springfield coal contains, on the average, 10.596 British thermal units, compared with 12,138 in the same amount of southern Illinois coal. Prior to 1916 the mine prices of Springfield and southern Illinois coals were the same, notwithstanding the difference in quality, and that parity was continued by the Fuel Administrator during the war. Between 1916 and February, 1919, the date of the removal of the Government price restrictions, the increased rates authoized in the Fifteen Per Cent Case (supra) and general order No. 28 of the Director General of Rail-

roads, aggregating 45 cents per ton, became effective from both groups. At the return of normal competition in April, 1919, the mine prices of Springfield coal declined, while those of southern Illinois coal increased. The decline in price of Springfield coal and the relatively larger decrease in production for 1919 are stressed as being indicative that the rates from the respective fields do not now produce the commercial equality contemplated in the establishment of the adjustment complained of.

The rate adjustment assailed, although originally intended to equalize commercial conditions and thereby permit the various coals to compete in common markets, apparently never has fully equalized the difference in the quality of the coals and the admittedly lower cost of production in southern Illinois. Complainants contend that for the present adjustment there should be substituted one which will reflect more nearly the actual differences in transportation conditions.

Numerous rate exhibits were introduced by complainants, showing that the ton-mile earnings under the rates from southern Illinois are substantially lower than those yielded by the rates from the competing fields. An effort was made to show that many of the mines in southern Illinois are situated on spurs or branch lines, and that the cost of assembling shipments is greater than in the districts to the north. No cost figures were presented. The terminal service in southern Illinois appears to be no greater on the whole than in the other districts. The differentials requested by complainants are based largely upon differences in distance from the respective groups. Considered from the standpoint of distance alone, however, the differentials here considered are not out of line with differentials approved by us in other proceedings.

In Ohio Valley Coal Operators Asso. *v.* L. & N. R. R. Co. (52 I. C. C., 187) we prescribed a differential of 15 cents for an average difference in distance of 55 miles in the hauls from mines on the Louisville & Nashville in western Kentucky and from the Middlesboro-Jellico group in eastern Kentucky to Cincinnati; in Stonega Coal & Coke Co. *v.* L. & N. R. R. Co. (39 I. C. C., 523), we prescribed a similar differential for a difference in distance of approximately 65 miles in the hauls from the Appalachia group in southwestern Virginia and from the Middlesboro-Jellico group to points north of the Ohio River, the cost of transportation from the Virginia mines being relatively high; in Ohio Valley Coal Operators Asso. *v.* I. C. R. R. Co. (supra), we prescribed a differential of 25 cents for an average difference in distance of 88 miles in the hauls from mines in western Kentucky and from southern Illinois on the Illinois Central to Chicago, there being certain transportation conditions which adversely affect the movement from the more distant mines; in Lake Cargo Coal Rates (46 I. C. C., 159), we prescribed a differential of only 28 cents for a difference in distance averaging 215 miles in the hauls from districts in West Virginia and eastern Kentucky on the one hand and districts in Ohio on the other; and in Ohio Valley Coal Operators Asso. *v.* I. C. R. R. Co. (supra), we approved a differential of 57.5 cents for an average difference in distance of 210 miles in the hauls over the Louisville & Nashville from mines in western Kentucky and from the Belleville group to East St. Louis.

A consideration of the facts of record points to the conclusion that the differences of 70 cents, 30 cents, and 10 cents assailed for average differences in distance of 200, 125, and 50 miles in the respective hauls from the Third Vein, Springfield, and Belleville districts and from southern Illinois are not unreasonable or otherwise unlawful.

The differentials assailed, however, have been disrupted by reason of the fact that uniform increases of 35 per cent following Increased Rates, 1920, have been applied to the rates from all groups in Illinois, and thus far the carriers have not worked out any plan for restoring the relative adjustment obtaining prior to that increase. The present situation is illustrated by the rates to Minneapolis. Prior to August 26, 1920, they were $2.15 from northern Illinois and $2.85 from Southern Illinois, a difference of 70 cents. Thereafter they became $2.905 and $3.85, respectively, a difference of 94.5 cents. In this respect the present adjustment is more favorable to complainants, and less favorable to southern Illinois operators, than the adjustment assailed.

To a certain portion of the northwestern territory, especially to points in southern Wisconsin, the differential basis generally prevailing has not been observed. At the time of the hearing the rates from southern Illinois and from the Belleville district to Madison, Wis., were the same, and the rates

from northern Illinois and from the Springfield group were only 50 cents and 20 cents, respectively, lower than the rate from southern Illinois. The rates from the latter district to Madison apparently were influenced by the Illinois intrastate scale which was applicable to destinations near the Illinois-Wisconsin line. As stated in the The Illinois Coal Cases (supra), the scale referred to favors long hauls.

The differential basis herein described has not been observed from the Fulton-Peoria district to that portion of the State of Iowa lying east of a line drawn from Dubuque, westerly via the Chicago Great Western to Farley, Iowa, thence in a southwestern direction via the Chicago, Milwaukee & St. Paul to Ottumwa, thence southeasterly via the Chicago, Rock Island & Pacific to Keokuk, also including points on the Chicago, Burlington & Quincy between Ottumwa and Oskaloosa. Formerly the usual differentials were applied in making rates from the Illinois mines to all the territory above described except the points on the Burlington between Ottumwa and Oskaloosa. In 1916 the combinations on the river crossings made lower rates than those based on the generally observed differentials. Accordingly rates to the destinations referred to were published on the combination basis and the differential adjustment thereby destroyed. For instance, to Cedar Rapids the differential of 40 cents between the Fulton-Peoria and Springfield rates was replaced by rate differences ranging from 12.5 to 36 cents. The previous advantage of 70 cents over southern Illinois was reduced to various amounts between 40 and 62 cents. This alteration in adjustment has driven operators in the Fulton-Peoria district from many Iowa markets, and has similarly handicapped complainants in the Third Vein district.

Rates from Springfield and southern Illinois to Iowa, constructed by adding 40 and 70 cents, respectively, to those to the same territory of destination from the Fulton-Peoria district, would no longer be higher than those made by combination, because of the increase made in the latter pursuant to general order No. 28. The reasons for the departure from the differential basis have, therefore, disappeared. Defendants do not oppose the restoration of that basis, but urge that this should be accomplished by increasing the rates from the Springfield district and southern Illinois rather than reducing those from the northern Illinois mines.

We find that the rates assailed to the northwest are not unreasonable or otherwise unlawful except to the following extent: (1) Rates from the Third Vein, Springfield, and Belleville districts to points in the northwest are and will be unduly prejudicial to operators in the districts named to the extent that they are less than 70 cents, 30 cents, and 10 cents per ton, respectively, below the rates contemporaneously maintained to the same destinations from the southern Illinois group; and (2) the rates from the Fulton-Peoria district to destinations in eastern Iowa referred to more specifically in the complaint in No. 10783 are and will be unduly prejudicial to the districts named to the extent that they are less than 40 cents and 70 cents per ton below the rates contemporaneously maintained to the same destinations from the Springfield and southern Illinois districts, respectively.

RATES TO ST. LOUIS.

Rates on coal from Illinois mines moving to and through St. Louis and East St. Louis are also on a group basis, but the grouping of the mines differs somewhat from that followed in fixing rates to the north and northwest. On this traffic the mines in the Belleville district and certain others, the most distant of which is 82 miles from East St. Louis, comprise what is known as the inner group, while most of the mines in the southern Illinois district are included in the so-called outer group, shown on the map at page 663 of our report in the Illinois Coal Cases (supra). The complaint in No. 11149 is directed, in part, against the relationship between the rates from the inner group and those from southern Illinois to St. Louis, East St. Louis, and points beyond.

The following table shows the rates to East St. Louis in effect over the Illinois Central from October 1, 1915, to the date of the hearing. Rates to St. Louis are 20 cents per ton higher than those to East St. Louis.

Date.	Local rates.			Proportional rates.		
	From Belleville.	From southern Illinois.	Differential.	From Belleville.	From southern Illinois.	Differential.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Oct. 1, 1915	37.5	52.5	15	25	40	15
July 1, 1917	52.5	67.5	15	40	55	15
June 25, 1918	75	90	15	62.5	77.5	15
Sept. 4, 1918	72.5	87.5	15	.....	.....	.....
Oct. 5, 1918	.....	.....	.....	60	75	15

The Ilinois Central and the Louisville & Nashville serve mines in both the Belleville and southern Illinois groups. The rates of the Louisville & Nashville from its mines in the southern Illinois district were 7.5 cents lower than those of the Illinois Central from mines in the same general terrtiory until recently, when the differential over the Belleville rates was increased to 15 cents, following our decision in Ohio Valley Coal Operators Asso. *v.* I. C. R. R. Co. (supra).

Prior to May 1, 1905, the differential maintained by the Illinois Central was 22.5 cents. On that date it was reduced to 10 cents, and since June 15, 1906, has been 15 cents. It is asserted that the reduction in the differential from 22.5 cents was forced by the St. Louis, Iron Mountain & Southern, now the Missouri Pacific, which constructed a line into the southern field in 1904 or 1905 and put in effect a lower basis of rates than the other carriers had theretofore maintained. The Missouri Pacific serves no mines in the Belleville field. In the Illinois Coal Cases (supra) the reductions in the rates from the Belleville group in 1905 were said to have been occasioned by the action of the Southern, which reduced the rates from its Belleville group mines in order to protect its operators against what was considered unfair competition on the part of certain short lines serving that field. In any event it appears that efforts were made shortly afterwards to restore the former differential of 22.5 cents, or to increase it to 25 cents, without avail.

The approximate average distance from all mines in the inner group to East St. Louis is 30.5 miles, and from southern Illinois mines 112 miles. The weighted average hauls from the inner and southern Illinois groups, based on actual movements throughout a period of years, are shown to be 23.72 miles and 126.08 miles, respectively. While the average distance from the inner group is therefore about 27 per cent of the average distance from the southern Illinois group, the local rate is 82.8 per cent and the proportional rate 80 per cent of the respective rates from the southern Illinois group.

One of these issues presented in the Illinois Coal Cases (supra) was whether the additional haul from the southern Illinois mines to St. Louis justified a differential in excess of 15 cents, and we found upon that record that it did not. At that time the local rate from the inner group to East St. Louis was 32 cents and that from southern Illinois 47 cents. Those rates yielded 10.5 mills and 4.2 mills, respectively, per ton-mile, based on actual average distances of 30.5 and 112 miles. The ton-mile earnings under the rates here assailed are 23.8 mills from the inner group and 7.8 mills from southern Illinois.

In Ohio Valley Coal Operators Asso. *v.* I. C. R. R. Co. (supra) we had before us the question of a differential in rates to East St. Louis from mines in western Kentucky served by the Illinois Central and Louisville & Nashville and those in the inner group on the lines of the same carriers. The average distance from mines in the inner group on the Illinois Central is 35 miles. The average distance from the Illinois Central's western Kentucky mines is 278 miles, a difference of 243 miles in favor of the inner group. For this additional haul we prescribed a differential of 57.5 cents, which, under the present relationship between the inner group and southern Illinois, is equivalent to 42.5 cents over the southern Illinois rate.

The average distance of all southern Illinois mines from East St. Louis exceeds that of the mines in the inner group by 8.15 miles, while the rate is only 15 cents higher. The difference in distance for weighted average hauls is 102 miles. The western Kentucky mines on the Illinois Central and Louisville & Nashville are 129 miles farther from East St. Louis, on the average, than the southern Illinois mines, and the rates are 42.5 cents higher. For a difference of 88 miles between the average hauls from western Kentucky and southern Illinois to Chicago we

prescribed a differential of 25 cents in the case last cited, due consideration having been given to the fact that a portion of the haul from western Kentucky is south of the Ohio River, where the rates are normally on a higher level than north of the river.

Interveners operating in the southern Illinois district oppose an increase in the present differential against their mines and state that during the 5-year period from April 1, 1914, to March 31, 1919, mines in the Belleville group supplied 81 per cent of the Illinois coal consumed in St. Louis and East St. Louis, compared with 13 per cent from southern Illinois mines. Various reasons are offered by complainant in explanation of the relatively small movement of southern Illinois coal to the St. Louis market. It is stated that the operations of several short lines serving the Belleville group are confined exclusively to that field; that southern Illinois operators enjoy more through rates to other consuming points, especially on fine coal, and that the markets open to Belleville mines are thus limited; that as St. Louis is a highly competitive market the prices are low and the operators in southern Illinois prefer to dispose of their coal elsewhere. It is also asserted that if the southern Illinois operators, having superior coal, desired to accept the depressed prices prevailing in the St. Louis and East St. Louis market they could readily displace the inner-group coal even with a differential considerably in excess of 15 cents.

Complainant asks for a differential of 40 cents at St. Louis. Certain of the defendants whose lines serve inner group mines suggest differentials ranging from 25 cents to 30 cents. Others decline to express any opinion on the subject.

Upon consideration of the record in No. 11149 we are of opinion and find that the rates on coal from the inner group to St. Louis are not unreasonable, but that they are and for the future will be, unduly prejudicial to operators in that group and unduly preferential of their competitors in the southern Illinois group to the extent that they are less than 22.5 cents per ton lower than the rates contemporaneously maintained from mines in the southern Illinois group to the same destinations.

RATES TO TERRITORY WEST OF ST. LOUIS.

Complainant in No. 11149 also asks that the differential prescribed at St. Louis be made applicable on coal moving through St. Louis to points beyond in Missouri and southern Iowa. To much of this territory, particularly on and north of the St. Louis–San Francisco extending from St. Louis through Springfield, Mo., except Kansas City and certain other points, the rates base on St. Louis and reflect the differential in effect at that point. These are joint rates built on the former proportionals of 25 cents and 40 cents to East St. Louis and local or proportional rates beyond. To Kansas City, Omaha, and other points, the rates from the Belleville group are, generally, the same as from East St. Louis and 40 cents lower than from southern Illinois.

Springfield, on the Missouri Pacific and the St. Louis–San Francisco; Jefferson City on the Missouri Pacific, Missouri, Kansas & Texas, and Chicago & Alton; and Moberly on the Wabash and Missouri, Kansas & Texas, are representative points in this territory. The rates to Moberly are $1.70 from mines in the inner group and $1.85 from the southern Illinois group. To Jefferson City the rate from the inner group, is $2 from the southern Illinois group $2.15 via the Missouri, Kansas & Texas and Missouri Pacific, and $2.25 via the Chicago & Alton. To Springfield a rate of $2.55 is maintained from inner group mines and $2.70 from southern Illinois mines on the Missouri Pacific.

Rates from the inner and southern Illinois groups to points in southeastern Missouri are not maintained on any definite relationship. The pricipal carriers operating in that part of Missouri are the Missouri Pacific, the St. Louis-San Francisco, and the Mississippi River & Bonne Terre. At the time of the hearing, coal from Illinois mines to stations on those lines moved generally through the East St. Louis gateways, and therefore the differences in distances from the inner and southern Illinois groups at destinations are the same as to East St. Louis. Prior to December 12, 1919, the route of the Illinois Southern, which extended in a southwesterly direction from Salem, Ill., through Centralia, Nashville, Coulterville, and Sparta, Ill., and Ste. Genevieve, Mo., to Bismarck, Mo., afforded the shortest distance to some of the points in that territory, but operation of that line was suspended on the date mentioned divering such traffic as had formerly moved thereover to routes via East St. Louis, Cairo, or Thebes, Ill. To some few points the routes through Cairo and Thebes are shorter than through East St. Louis. The Illinois Southern has recently been reorganized

and its name changed to the Missouri-Illinois. It is to be operated under joint control with the Mississippi River & Bonne Terre and is expected to haul a considerable coal tonnage from Illinois mines to points on that line.

There are no joint rates in effect from mines in the inner or southern Illinois groups of stations on the Missouri Pacific from St. Louis to Riverside, Bismarck, and other points in southeastern Missouri, rates being made by combination on St. Louis. The Missouri Pacific, however, maintains local rates from its mines in the southern Illinois group which are approximately the same as the combination rates from mines in the inner group, the rate to Bismarck being $1.90. The average distance from the inner group mines to Bismarck, via East St. Louis, is 110 miles, and from southern Illinois mines on the Missouri Pacific 202 miles. To stations on the line of the St. Louis-San Francisco, paralleling the Mississippi River south of St. Louis, joint rates are generally maintained. The rates from Illinois Central mines are the same from both the inner and southern Illinois groups; from Louisville & Nashville mines a differential of 15 cents is observed, and from mines in the southern Illinois group on the Mobile & Ohio the rates as a rule are lower than from the inner group.

The Mississippi River & Bonne Terre, reaching an important coal-consuming territory, extends from Riverside, 30 miles south of St. Louis, to Doe Run, Mo., with various branches to points in the lead belt in eastern Missouri. Rates from mines in the inner group on the Louisville & Nashville to stations on the Mississippi River & Bonne Terre are maintained on the basis of 5 cents per ton lower than from its southern Illinois mines; the Mobile & Ohio maintains the same rates from both the inner and southern Illinois groups. Rates from Illinois Central mines are made by combination. In Perry County Coal Corp. *v.* Director General (60 I. C. C., 250) we prescribed rates from Coulterville, O'Fallon, and Sparta in the inner group to points on the Mississippi River & Bonne Terre not in excess of those published by the Southern from its mines in the inner group to the same destinations.

We are of opinion that the rates from the Belleville district to points in Missouri and southern Iowa, except Missouri River cities, to which the traffic moves through St Louis, are not unreasonable, but that they are, and for the future will be, unduly prejudicial to operators in that district and unduly preferential of their competitors in the southern Illinois district to the extent that the rates from the Belleville district are less than 22.5 cents per ton lower than those contemporaneously in effect from southern Illinois.

RATES TO KANSAS CITY.

Illinois coal moves into the Kansas City district over the rails of the Chicago & Alton, the Wabash, the Chicago, Burlington & Quincy, the Chicago, Rock Island & Pacific, and the Missouri Pacific, and their connections. The Chicago & Alton serves mines in the Springfield district in Illinois, from which the route to Kansas City is through Louisiana, Mo., approximately 95 miles north of St. Louis. The average distance from these mines to Kansas City is 307 miles. The Wabash serves mines in the southern portion of the Springfield group, where it is overlapped by the inner group, and also in the Springfield group proper. That road crosses the Mississippi River at Hannibal, Mo., 120 miles north of St. Louis, and also at the latter point. The average distance from the Wabash mines to Kansas City via Hannibal is 367 miles. The average distances from the mines in the southern portion of the Springfield group are 419 miles via Hannibal and 312 miles via St. Louis.

Without setting forth in detail the history of the rates to Kansas City, it will suffice to say that until the summer of 1916 rates from the Springfield group mines were the same as the rates from East St. Louis. Rates from the Belleville group were 25 cents and from the southern Illinois group 40 cents higher, except from mines on the Southern. The rates from the mines last referred to, applicable in connection with the Chicago & Alton, were the same as those applying from the Springfield group and from East St. Louis. In Coal to Missouri Stations (39 I. C. C., 520), we required cancellation of tariffs proposing to increase those rates 25 cents over the East St. Louis-Kansas City rates.

Being desirous of serving the Kansas City market, which had theretofore been supplied almost exclusively from the Kansas, Missouri, and Arkansas fields, the Chicago & Alton established a rate of $1.25 per ton on fine coal from the Springfield district, effective August 22, 1916. This was a reduction of 65 cents under the previous rate. On October 15, 1916, it published rates of $1.60 on fancy lump coal and $1.50 on commercial lump and mine run. These rates

were met by the Wabash, except that the latter's rate on fine coal was made $1.35. The effect of these reductions was to establish rates on coal from the Springfield group mines on the Chicago & Alton and the Wabash materially lower than the rates from East St. Louis and mines in the Belleville group. When the Chicago & Alton published these rates we were asked by coal operators in Kansas and certain carriers serving other districts to suspend the tariff, but we declined to do so. The present rates, resulting from the increases authorized in the Fifteen Per Cent Case (supra), and General Order, No. 28, as modified by later orders, are $2.05 on fancy lump, $1.95 on commercial lump and mine run, and on fine coal $1.70 from Chicago & Alton and $1.80 from Wabash mines. The rate on all grades from East St. Louis is $2.45, which is the same as applies generally from the Belleville group.

Complainant in No. 11149 alleges generally that the rates from the Belleville group to destinations west of the Mississippi River, including Kansas City, are unreasonable and unduly prejudicial in comparison with the rates from other districts in Illinois, including the Springfield group, and from mines and groups in other States. Coal mined in Kansas, Missouri, Arkansas, and Oklahoma is sold in the Kansas City market in active competition with Illinois coal, and the Southwestern Interstate Coal Operators Association, representing operators in the southwestern field, intervened. Complainant's evidence has been confined to the relationship between the inner and southern Illinois groups and does not touch on the Springfield adjustment. So far as Kansas City is concerned, complainant is satisfied with the relationship between the rates from the inner and southern Illinois groups.

The members of the Southwestern Interstate Coal Operators' Association have no interest in the relationship between the rates from the inner and southern Illinois groups; their interest, as shown by the record, is in the rate maintained by the Chicago & Alton and Wabash on fine coal from the Springfield district, which, they contend, is too low and has resulted in displacing southwestern coal in the Kansas City market. Civic and commercial interests in Kansas City intervened in support of the rates from the Springfield district. Upon consideration of the issue raised by these interveners, we are of opinion that it should not be dealt with in this proceeding.

The records in these cases disclose a conspicuous lack of uniformity with respect to the maintenance of rates on fine coal from the various Illinois districts. The same differentials should be established on fine coal as on other grades.

No order will be issued at this time, but the defendants will be expected to establish rates in conformity with our findings within 90 days. If such rates are not established within that time, the matter may again be brought to our attention. In revising their tariffs defendants should establish rates which will yield as nearly as practicable the same revenue in the aggregate as is afforded under the present rates.

Eastman, commissioner, dissents.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

The CHAIRMAN. Is the effect of that order to say that the Interstate Commerce Commission, having fixed these rates, it has no jurisdiction to change them?

Mr. SLATER. It says it has not. It refuses to do so. Now I want to tell you about the grain case.

The CHAIRMAN. Well, does it refuse to do so because it has thought that the complaint is not sustained, or because it has not jurisdiction? Read that again, please.

Mr. SLATER. No, sir; it says here in this order of the Interstate Commerce Commission:

"The complaints, all of which were filed prior to the termination of Federal control, assail as unreasonable and unduly prejudicial the rates on bituminous coal from various groups of mines in the State of Illinois to points in Illinois, Indiana, Iowa, Minnesota, Wisconsin, Michigan, Nebraska, Kansas, North Dakota, South Dakota, and Missouri. Since intrastate rates are not subject to our jurisdiction, excepting under conditions not here present, interstate rates only will be considered."

The CHAIRMAN. Well, when was that decision delivered?

Mr. SLATER. July 7, 1921, the past July.

The CHAIRMAN. Well, that is in direct violation of the transportation act.

Mr. SLATER. We have the two orders. We are enjoined. The commission refuses to act and has fixed our rates, and says, "Do not change them. Leave them there. Do not change those rates until we order you to change them."

The CHAIRMAN. But the very fact that it has fixed them, and the law says that they shall remain in effect until changed by order of the Interstate Commerce Commission, explicitly confers upon the Interstate Commerce Commission the authority to change them.

Mr. SLATER. Well, we think somebody ought to have the right to change them, but we do not know who it is. Now, I want to tell you that I went to the Interstate Commerce Commission and I tried to reach the director, and I could not reach him, he was busy. This was about a month ago. I finally got in touch with Mr. McChord's secretary, and I explained the Illinois situation to him. I said, "Now, here, we filed a complaint with the Interstate Commerce Commission. We tried to have these rates changed. You promptly dismissed us and told us, 'we have no jurisdiction.'" I said, "What do you want us to do? Do you want us to come back to you? Tell us what you want us to do and we will do it. Tell us what to do to get these rates changed." "Well," he said, "that is a bad situation. I don't know." "Well," I said, "will you take it up with the members of the commission?" "Well," he said, "I dont know as it will get very far if you do that."

Now, there isn't any one changing the rates in Illino's. That is the situation we are confronted with. And the carriers contend, and have been successful in contending, that this transportation act, section 15(a) which authorizes the Interstate Commerce Commiss'on to fix rates so that they shall yield 6 per cent on the value of the property, authorizes the Interstate Commerce Commission to fix intrastate rates, because they could not fix interstate rates without fixing intrastate rates in order to produce the 6 per cent on the returns of the property.

The CHAIRMAN. They claim that. Has any court said that?

Mr. BENTON. If I may interject, there are three opinions which I propose to put into the record.

Mr. SATER. We have the order of the Federal court following the position of the carriers.

Senator POMERENE. Yes; but the injunction that you read does not hold anything of that kind.

Mr. SLATER. Well, it does not state the reasons, Senator, but I happened to have been there at the time and, as I stated, Judge Baker characterized the railroads as national highways under the transportation act.

Senator POMERENE. Now let me call your attention to a matter here. This is simply an order for an interlocutory injunction. Have you got the final decree that was entered here?

Mr. SLATER. No; that injunction applies until the matter is determined by the United States court. That is the only decree that was entered.

Senator POMERENE. Well, they say here that this order is issued pending the final hearing of this case.

Mr. SLATER. The final hearing was on the same day. We only had one hearing—on February 14. The case came up on an application of the carriers for a temporary injunction. The court said, "We won't give you a temporary injunction. We are going to l'sten to this whole thing to-day and at the conclusion of the case we will decide the matter." They never made anything more than the one order.

Senator POMERENE. But there must be some other order, otherwise I do not see how you can get into the Supreme Court. Here is the first paragraph reciting these statutes:

"First. That the statutes of the State of Ilinois, known as the public utilities law of Illinois, being sections 33, 34, 35, 36, 37, 75, 76, 77, 78, and 79 of chapter 111-a of the Revised Statutes of Illinois (Hurd's R. S., 1917), and the reports and orders of the Public Utilities Commission of Illinois made pursuant thereto, being the orders of the State public utilities commission entered on August 10, 1920, and October 18, 1920, are in conflict with the report and orders of the Interstate Commerce Commission, dated January 11, 1921, and January 31, 1921, in its docket No. 11703, entitled 'In the Matter of Intrastate Rates within the State of Illinois,' and that the enforcement, operation, and execution of said State statutes and the said orders of the State public utilities commission, and each of them, against the plaintiffs and each of them, their officers, agents, servants, and employees, on account of putting into effect, charging, and collect-

ing the intrastate rates, fares, and charges established in the State of Illinois pursuant to said report and orders of said Interstate Commerce Commission, be restrained pending the final hearing of this cause."

Now, when it comes to the actions of the Attorney General and of the attorneys of Cook County and the other representatives, they say in the conclusion here: "until the final hearing of these causes, or until the further order of this court."

Now, this is dated the 14th day of February, 1921, and signed Baker, Page, Carpenter, judges. Now, clearly there is some further order than that.

Mr. SLATER. If there was we never received it, and we only had the one hearing and that was February the 14th.

Senator POMERENE. Well, unquestionably under that order your attorneys have got the right to go into court and ask for a modification of that decree.

Mr. SLATER. Well, we propose to do that. I do not know whether we will be successful. I doubt it very seriously.

Senator LA FOLLETTE. There is an appeal from this order, so Mr. Benton has stated, and it is pending in the Supreme Court.

Mr. BENTON. I am glad to state what my understanding of the situation is: The defense of the Illinois rates has been entrusted in Illinois by the Attorney General to former Chairman Wilkerson, of the public utilities commission, who is now, I think, an Assistant Attorney General.

Mr. SLATER. That is correct.

Senator POMERENE. You mean the United States Assistant Attorney General?

Mr. BENTON. No; he was formerly United States district attorney, and he is now in the Attorney General's office.

Mr. SLATER. First assistant attorney general.

Mr. BENTON. Yes; first assistant attorney general of Illinois. And the case has been heard upon its merits, so far as the court in Illinois will hear it, according to my understanding. The case has been "settled." And the only thing, according to my understanding—and I wish Mr. Slater will correct me if I am wrong—that delays its entry in the Supreme Court is the question of printing this voluminous record, which will cost, as I was advised by Assistant Attorney General Culver, approximately $20,000. It will cost that amount to print it.

The CHAIRMAN. Well, if it is settled, what is the use of the record?

Mr. BENTON. That is the voluminous record in Ex parte 74.

Senator LA FOLLETTE. You do not mean settled—you mean determined as between the parties?

Mr. BENTON. Oh, I should have said the exceptions had been settled. The exceptions taken by the State to be transmitted to the Supreme Court. I mean the plaintiff's bill of exceptions.

The CHAIRMAN. Is there to be any modification in that settlement of this injunction against the commission from going on to take their jurisdiction of State rates?

Mr. BENTON. I perhaps ought not to have used the word "settled." In the State of New Hampshire we speak of settling the bill of exceptions, merely meaning settling the terms of the bill of exceptions.

The CHAIRMAN. Yes; of course you do not mean that the merits of the matter had been settled.

Mr. SLATER. No.

Mr. BENTON. No; I should have said that everything has been done preparatory to entering the case in the Supreme Court, except the actual printing of this record.

Senator POINDEXTER. Well, what have you to say to Senator Pomerene's inquiry, which is a very pertinent one, as to the legal anomaly apparently of taking an appeal from an interlocutory decree?

Senator POMERENE. Well, that can be done in some of the States under the State practice. I am not familiar with the Federal courts.

Mr. SLATER. I will develop that information for you, Senator, and wire it to Washington upon my return to Illinois.

Senator POMERENE. What is that?

Mr. SLATER. I will develop the information for you concerning the appeal from this order and wire to you upon my return to Illinois. I will be glad to do that.

The CHAIRMAN. I understand that Mr. Benton's statement is that while the final decree has not been entered it will be entered the moment they can make arrangements for incorporating into the record this testimony in Ex Parte 74.

That, so far as the terms of the final decree are concerned, that is all settled. But that the final decree has not yet been entered.

Mr. BENTON. I am by no means certain that it has not been entered. I mentioned the fact that it was in the hands of Judge Wilkerson, because I do not think there is a man in the country that is better qualified to take care of this kind of a case than Judge Wilkerson is, and my advices from him were that it was ready for entry in the Supreme Court, and I think it may possibly be that there is another decree than this, or it may be that under the practice in that district an appeal can be taken from a decree in this form.

Mr. SLATER. I will develop that information for you and explain it within the next week.

Senator POMERENE. If that appeal has not been perfected, I would be greatly surprised at least to learn that you could not by motion or supplemental petition or by some proceeding ask the court for a modification of this former decree so as to take care of the very situation that you speak of.

Mr. SLATER. The court was of the opinion, as I stated, that under the transportation act the railroads of this country were now national highways, and that the State had absolutely no jurisdiction. Judge Baker made that statement. So we have no chance of having this modified.

Senator POMERENE. I can not think that the court would want to leave you where you had no relief at all. It is certainly a strange situation.

Mr. SLATER. Between the court and the Interstate Commerce Commission that is the situation in Illinois.

Now, just let me call your attention to the further order of the Interstate Commerce Commission, and this is a very recent case. This case was decided by the Interstate Commerce Commission, October 20, 1921.

Senator LA FOLLETTE. What is the title of it?

Mr. SLATER. It is the Interstate Rates on Grain, Grain Products, and Hay, in Carloads, between points in the western and mountain-Pacific groups. Now, bearing in mind that Illinois, so far as the western group is concerned, goes over to the eastern boundary of the State of Illinois, that is, Illinois is a part of the western group; when we learned of this proceeding, Col. Smith, Mr. Wood, and myself appeared before the Interstate Commerce Commission, and we asked the Interstate Commerce Commission if we were included in this investigation. Commissioner Lewis and former Chairman Clark, the two commissioners presiding at the time told us "No; you are not included in this investigation." Well, we insisted that we ought to be included. That these very railroads whose rates might be reduced on grain, grain products and hay are operating in the State of Illinois, and carrying the bulk of the State traffic and interstate traffic into and out of Illinois. Well, we said we wanted to be heard upon the case of including Illinois. They said, "All right, we will hear you." So we argued the matter before the two commissioners, as I stated, and then they told us, "We will decide the matter at 2 o'clock this afternoon." We went back at 2 o'clock in the afternoon, and they said that there were not enough commissioners there to decide it. They said, "We will tell you to-morrow morning." So we stayed until the following morning, and they then said, "Yes; you are included."

Now, all the circumstances and conditions that warranted a reduction on grain, grain products, and hay likewise applied in Illinois. As the Interstate Commerce Commission states—and all of this I am going to connect up with this transportation act:

"The western farmers, including those in Illinois, in 1920 produced 75.7 per cent of the Nation's wheat, 54.2 per cent of the corn, 68.4 per cent of the oats, 59.5 per cent of the rye, and 89.5 per cent of the barley. These farmers"—

Speaking of these farmers in the western group of States, including Illinois—

"These farmers are suffering from severe readjustments, and, generally speaking, are operating at a loss or without profit." And so forth. Their consideration embraces the evidence pertaining to the Illinois farmers as well as the evidence of the farmers in the western group. But they conclude:

"The reduction in rates here required may make desirable some reductions in rates east of the western district, particularly interstate in Illinois."

Now they refuse to touch the intrastate rates. In our arguments before the commission at the time this case was presented to the Interstate Commerce Commission we pointed out to that commission that we were without jurisdiction to determine the intrastate rates, and we asked that they include in this investigation both State and interstate rates. We were promptly told that they did not have jurisdiction over the intrastate rates, and although all of the evi-

dence in this case pertains to Illinois as well as the western district west of the State of Illinois, the only thing that we got out of this order is the statement by the Interstate Commerce Commission that "the reduction in rates here required may make desirable some reduction in rates east of the western district, particularly interstate in Illinois."

Senator LA FOLLETTE. Did they not change the interstate rates in Illinois on hay and grain?

Mr. SLATER. Not from a point in Illinois. I might explain to you what I mean by interstate rates, and what they have in mind in that order. You understand the grain moves into the Chicago market and moves out from there to the seaboard under what we term specifics, and it is a proportional rate out, so the grain coming into Chicago from Illinois points and which ultimately moves to the seaboard moves into Chicago under a specific, which, in connection with the seaboard rate makes it an interstate rate from Illinois points to Chicago, and that they refused to touch. But from Iowa it is reduced. From Iowa the rates were increased 35 per cent. The Interstate Commerce Commission said, "Take off half of that increase over the rates that were in effect August 25, 1920." They have us in the position where we can not reduce the State rates in the State of Illinois. They decline to give us relief.

From Wisconsin to the city of Chicago, the biggest grain market in the United States, the advance paid by the farmers of Wisconsin will be, under this order, 17½ per cent over the rates that were in effect August 25. Into that same market our farmers in Illinois are paying and will continue to pay 40 per cent over the rates which were in effect August 25, 1920, unless the carriers will voluntarily reduce the rates, and I think that everybody knows that the carriers will not voluntarily reduce any rates.

So I say to you, as far as Illinois is concerned, we are absolutely without any relief. We have legal rights without a remedy, and we will continue to have these rights without a remedy so long as this transportation act stands and is construed and will be construed by the carriers and they are successful in having the courts to construe it in the manner in which they have construed the transportation act, particularly 15 (a) and paragraph 4 of section 13.

Now, take paragraph 4 of section 13. That, as I recall, is the provision which we thought was merely enunciating the principles established in the Shreveport case. But they have not construed it that way. They say, "No; you take the two together. Section 15 (a) says the rates shall be made by the Interstate Commerce Commission so that they shall yield a fixed return upon the property value of the carriers devoted to that use."

Now, we can not do that if you do not put the same percentage advance on State traffic that you put on interstate traffic, and if you do not do it, paragraph 4 of section 13 says that there is a discrimination, and that this discrimination must be removed. And how is it removed? By increasing the rates to the same percentage advance fixed by the Interstate Commerce Commission.

Now, just prior to this order of October 20, 1921, the Terminal Railroad Association of St. Louis applied to the Illinois commission for authority to increase their rates in the State of Illinois. They said, "We are not making enough money. We have to increase these rates. We are now getting a division of the through rate, a greater division than the local rates or the local traffic are producing. Therefore we must increase these rates. Our rates are improper. They are out of line in consideration of the proportion of the through rates we get. They are insufficient, they are not producing the revenue that we are entitled to receive. Therefore our rates must be increased."

Now, the Illinois commission considered the application and pointed to this injunction and said, "We have not the power to increase rates," although it was argued by counsel for railroads that the State commission had the power to increase rates but no power to reduce rates under the transportation act. It was Judge Kramer who argued that. Of course, we did not have that power, in our own judgment. If we are going to operate at all we are going to have the power to change rates up or down.

We dismissed the application, but bear in mind, if we had not been enjoined and we dismissed the application of the Terminal Railroad Association because the rates had been fixed so that the carriers in the aggregate, the Terminal Railroad Association included, yielded 6 per cent on the value of the property, and those rates of the Terminal Railroad Association should be shown to be confiscatory, you can imagine what would happen to the order of the State commission.

Now, you might increase all the rates of the eastern district 40 per cent in order to produce 6 per cent on aggregate value of the property of those carriers, and the State commission might, upon an application of one of the carriers in that particular group, find that the rates are confiscatory but deny the relief sought because the rates have been fixed so that some other carrier, together with this particular carrier, will receive 6 per cent on the aggregate value of the property. Now, what are we going to do with a case of that kind? We dismissed the application for want of jurisdiction.

Shortly after a representative of the Peoria & Pekin Union Railroad came and had a talk with us and wanted to know what we would do with the Peoria & Pekin Union Railway's rates. He said, "We are not making enough money. We are losing money." And that railroad applied to us for authority to increase rates. We can not do that. The transportation act says that if your carrier, together with several other carriers, produce 6 per cent on the value of the property, it is getting all that it is entitled to get. "Well," they said, "suppose the rates are confiscatory?" "Well, suppose the State is denied the power to grant the relief sought?" Thus we disposed of that question.

Then came the question of the highways. In the State of Illinois we have a plan for construction of highways. We have actually constructed about 400 miles of road this year, and our plan for the coming year is for the construction of probably three or four times as much road as that. Our rates on road-making material, which were advanced 40 per cent, cost the State of Illinois to haul the cement, sand, and gravel and crushed stone to the point at which the road is being constructed at an average cost of $6,600 a mile. I petitioned the carriers for relief, and I said, "These rates are entirely out of line. They are too high." They listened to me very attentively, and about a month expired and they dismissed the application—denied it.

In the State of Indiana the carriers reduced the rates, took off 25 per cent of the 40 per cent advance. In the States of Pennsylvania, New York, Maryland, part of West Virginia and Virginia the carriers took off 25 per cent of the 40 per cent advance. In the State of Michigan they adopted a new scale known as the Michigan scale, which reduced the rates a substantial amount. In the State of Wisconsin, as you heard from Mr. Jackson's statement, they put in new rates. In the State of Washington they never paid 1 penny of the 35 per cent advance.

Now, in the State of Illinois we pay the 40 per cent advance. You can not go to the Interstate Commerce Commission for relief. You can not go to the State commission for relief. But you pay $6,600 a mile to haul this road material to the point at which the road is being constructed, because there is a right without a remedy, and we have no place to go. We can only come to Congress and ask them in fairness to the State of Illinois to amend the transportation act so the State will have the power they should have to reduce the rates to the proper level.

Now, in respect to this guaranteed return, as it is called, which I do not take to be a guaranty at all—no; it is not, as a matter of fact—in the State of Illinois the State commission has never fixed rates to yield as low as 6 per cent on any public utility in the State. So I do not see that we are here to wreck these carriers. We are here because we know that some of these rates are improper and that some of the rates should be increased and some reduced, and we have no manner of means of having the rates changed.

We are now in the midst of this road-building program in the State of Illinois, and we appealed to the carriers who have it exclusively in their hands as to whether we shall pay $6,600 a mile for the haulage of this material for the construction of those roads, or whether we shall pay $10,000 a mile or $2,000 a mile for relief, and they tell us they will give us no relief, although they have reduced voluntarily rates in the other States and although the Interstate Commerce Commission has approved the reduction in the other States.

Now, I do not want to take up any more of your time. I could point out to you thousands of these cases in the State of Illinois, switching rates, etc., in which the carriers will not change the rates, saying they are too busy. But we are not too busy to change some of these rates. We were not too busy to listen to the Terminal Railroad Association case, and as it was shown that they were not entitled to what they asked, we were not too busy to say that we would deny it. When this case was presented to the Illinois commission the order of the Interstate Commerce Commission came out on August 10, and the order of the Illinois commission came out on August 11. Now, that is act-

ing very promptly. We are not delaying these cases. We gave them 33⅓ per cent, and immediately when the supplemental order came out we reconsidered it and gave them a raise, and we did not delay them one minute. We told them, "We are ready now, if you want to proceed with this case." But we do not think we are being treated fairly in that we can not have any rates in the State of Illinois readjusted although the interstate rates are being readjusted all around us.

Senator POINDEXTER. The Interstate Commerce Commission has never held that you could not adjust the rates for them?

Mr. SLATER. By this order they say that these rates shall remain in effect until the further order of this commission.

The CHAIRMAN. But those were not intrastate rates.

Mr. SLATER. Absolutely, those were intrastate rates. That is where they fixed these rates in the State of Illinois, in docket 11703, and said, "Don't you change those rates until you get our order." Then when we applied to them, "We have not the power to change them." Those are the two things they said to the State of Illinois and the shippers of the State of Illinois.

Senator POMERENE. You agree with Judge Hale, do you not, that as you construe the transportation act it was simply a declaration of the law as it had been construed by the Supreme Court in the Shreveport and other cases?

Mr. SLATER. I think that I agree with him that that was the intention. But there is just this difference between the two. The language of that act, in which it states that the Interstate Commerce Commission shall prescribe rate groups and fix the rates in the particular groups so that they shall yield a fixed per cent return on the value of the property, has been construed to embrace both State and interstate, and they point out very frequently how it would be impossible for the Interstate Commerce Commission to fix rates so that they shall earn 6 per cent unless they also fix the State rates together with the interstate rates.

Senator POMERENE. Well, these rates were not fixed for the purpose of securing 6 per cent. The commissioners have said so before this committee.

Mr. SLATER. Well, I do not mean a particular per cent. So that they shall return a fixed per cent return on the property they have.

The CHAIRMAN. I suppose that Mr. Benton will show us that some court has said that. I have not known that any court has said it. The Interstate Commerce Commission has not said that, and anyone who construes that paragraph in section 15 (a) to broaden the jurisdiction of the Interstate Commerce Commission and confer upon it the power to fix intrastate rates other than as is provided in amended section 13 seems to me to deliberately misconceive and falsify the law. There is nothing in section 15 (a) that by any reasonable construction could affect the respective jurisdictions of the Federal and State commissions.

Mr. SLATER. No; I agree with you that is true. But here is this difficulty about it. Every time there is a change in the interstate commerce act it requires a great deal of litigation before it is construed in a manner that all will understand. Now, here is what happened before 15 (a) became effective. It was the duty of the Interstate Commerce Commission to fix rates so that they should produce a fair return on the fair value of the property.

The CHAIRMAN. They had to take into consideration the revenue derived in the States.

Mr. SLATER. They undoubtedly had to, but as soon as that act came out and it directed the Interstate Commerce Commission to do that which it was legally bound to do, then the carriers said, "Now, the Interstate Commerce Commission has exclusive jurisdiction." Now, whether they have or not, and whether the act is what the carriers contend it is or not, you can consider the situation we are in. We are in jail.

The CHAIRMAN. I have nothing even to suggest by way of palliating these misconceptions of the law and this invasion which seems to have been made upon State jurisdiction, but there is nothing in that part of this act that does it.

Senator LA FOLLETTE. Mr. Benton says there are three courts that have held that there is.

The CHAIRMAN. I don't care how many courts have held it.

Senator LA FOLLETTE. You are like the attorney that was talking to the fellow that was in jail.

The CHAIRMAN. No; I am not. The Supreme Court will never hold it.

Senator LA FOLLETTE. We will know better about that when they decide some of these cases.

The CHAIRMAN. As I remarked the other day, I do not view that part of section 15 (a) as of any future value at all; none whatever. And I am not saying that because it may have been misconceived and misinterpreted, that I will be disposed to modify it. I do not say that. But I do say that the court which decides that 15 (a), or that paragraph of 15 (a), changes or modifies or enlarges the jurisdiction of the Federal commission with respect to State rates, has made a mistake.

Mr. BENTON. Mr. Chairman, if I may say, I do not want to overstate the effect of these opinions. I had planned that as soon as I could get to it I would put the opinions in. There are three decisions of Federal courts, which, in sustaining these orders that have been made fixing interstate rates, have discussed 15 (a) as justifying the commission in exercising the power they claim.

The CHAIRMAN. I will wait until those decisions go in.

Senator POMERENE. I want to make this observation, and if I am wrong about it I would like to be set right about it. Judging from what you have said and from what Judge Hale has said, it seems to me that in view of the financial condition of the railroads during the last year or two, and the effect of the Interstate Commerce Commission to increase rates for the purpose of increasing revenues, that the condition about which you complain under the old commerce act, as construed by the United States Supreme Court, could just as well have happened as it does under the transportation act.

Mr. SLATER. Well, we do not believe that the carriers would have been as successful in the United States district court in securing this injunction if it had not been for the transportation act.

Senator POMERENE. It did not happen until the transportation act was passed.

Mr. SLATER. The court pointed to the transportation act and said that under this act the carriers are now national highways, and with that we end.

The CHAIRMAN. That is your generalization?

Mr. SLATER. Now, just as a final plea for Illinois. You understand the situation we are in. We are down here before you because we know that we can get relief here.

The CHAIRMAN. You want the injunction dissolved?

Mr. SLATER. That is what we want, and we can not get it dissolved any way except by having the transportation act amended, or unless the United States Supreme Court reverses the United States district court. But we can get it here, and we can get it promptly.

Senator POMERENE. I am very much interested in knowing whether that interlocutory order was made final.

Mr. SLATER. I will wire you that information.

Senator POMERENE. And whether your attorneys there are of the opinion that you could go before the court and ask a modification of that order. I am perfectly clear in my own mind that you can, unless some final order has been made. I have no doubt about it.

Mr. SLATER. I am leaving here, Senator, at 1.22, and I will wire that information to you from Chicago to-morrow morning. I will be very glad, indeed, to give you that information.

I can only say that the people of Illinois are looking to the relief that we know we can get here in Congress, and we are doubtful that we can get it at the other place. We know that we can get it from you promptly. We do not know whether we will ever get it through any other channel. Now, we are just here asking you to help us.

Senator POMERENE. When you went before the Interstate Commerce Commission, asking them to modify the local State rates—you did that, did you not?

Mr. SLATER. In the coal case; yes.

Senator POINDEXTER. They said, as I understood you, that they had no jurisdiction?

Mr. SLATER. Yes, sir.

Senator POINDEXTER. Did you then call their attention to the fact that they themselves had assumed jurisdiction?

Mr. SLATER. Not in that case.

Senator POINDEXTER. And that they had made an order that the rates fixed by them should not be changed until their further order?

Mr. SLATER. Not in that case, I did not. I did in the grain case. I did not appear in the coal case.

Senator POINDEXTER. I wanted to know if that question had been directly presented to them, and how they would extricate themselves.

Mr. BENTON. Mr. Chairman, it seems the most astonishing situation. There is some explanation for it, and had I had an opportunity to complete the opening statement I would have shown the theory upon which the Interstate Commerce Commission freezes the rates by an order in one case and refuses to change them upon an application in another. I will gladly state it whenever an opportunity can be reached. It is not so silly as it would seem at first glance. It is a condition which arises out of construing the act as they have.

Mr. SLATER. I want to thank you gentlemen for your kind attention this morning. We are in a serious situation in Illinois, and we are asking for help.

Senator LA FOLLETTE. Mr. Slater, you are the official rate expert of the commission?

Mr. SLATER. Yes, sir.

Senator LA FOLLETTE. May I inquire whether you are an attorney?

Mr. SLATER. No, sir. I have done everything except take the bar examination. No; I am not an attorney. I have been with the Illinois commission since 1914. I have been in this business for 22 years.

The CHAIRMAN. We are very much obliged to you for the light you have shed on this subject.

Senator LA FOLLETTE. You understand my inquiry was not to raise any question as to your fitness and qualification to appear and represent the commission.

Mr. SLATER. I understand.

The CHAIRMAN. Who is the next commissioner?

Mr. BENTON. Mr. Webster is not here. Whether there is any other commissioner who wanted to make a statement at this time I do not know. If there is not, in order that I may supply the information which I think Senator Poindexter would be interested in receiving, I would like to take that matter up.

The CHAIRMAN. Mr. Benton wants to introduce at this time an explanation on the apparent position of the commission that it can fix a State rate, but then can not unfix it.

STATEMENT OF MR. JOHN E. BENTON—Resumed.

Mr. BENTON. You will remember, Mr. Chairman, that these proceedings in which these intrastate orders have been named, have been under section 13, paragraph (4) of the amended interstate commerce act; which provides that "Whenever * * * the commission * * * finds that any * * * rate"—I am not reading the entire paragraph, but trying to get the essential words—"causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby."

It is in that language that the Interstate Commerce Commission claims to find an addition to their preexisting authority and full power to order into effect intrastate rates. As the preceding witness pointed out, the rates which they prescribe under this section are to continue in force as long as the order does. The commission has the right under another section of the act which I called your attention to yesterday to make the order for a specified length of time, or until a further order of the commission.

They have chosen to make all of these intrastate rate orders until further order of the commission. So that the effect is to absolutely destroy—assuming the validity of the Interstate Commerce Commission's order—the rate-making power of the State so far as those rates are concerned.

Now, while they have thereby claimed the power to put those rates into effect, they claim it on the ground that they are discriminatory. They do not claim to review them, as Judge Jackson said this morning, upon the ground of their reasonableness. They do not claim to change an intrastate rate on the ground that it is discriminatory as compared with some other intrastate rate; that it is too high or that it is too low. The only ground that they claim power to proscribe it on is that it is discriminatory against interstate commerce.

Now, Judge Jackson pointed out that when they are making the order they apply to the word "discrimination" not only the meaning which was recognized by the United States Supreme Court in the Shreveport case but a brand new meaning, which is that it does not supply so much of the revenue of the interstate carrier as the Interstate Commerce Commission thinks it ought to.

Now, if they were logical, having applied that second meaning to the word "discrimination" in that paragraph, when a shipper came to the Interstate Commerce Commission and said, "By reason of the increase you put on my rate is now too high, and you should reduce it," they would say, "We did make that order upon the ground that this rate was discriminatory in this peculiar sense, that it did not yield revenue enough. We will review it, and if we find that in fact without the full increase which we put on it is yelding its fair share of the revenues of the carriers we will reduce it."

But they have taken the illogical position that when State shipper comes to them and presents a State rate, not upon the ground that some interstate rate is on a different basis than that, but simply on the ground that it is too high, made too high by their order, they have no jurisdiction over it. In other words, when a shipper comes in and complains that his rate is too high they say, "The Interstate Commerce Commission has no jurisdiction over the reasonableness of a rate." When a State shipper comes and complains that some other State rate is discriminatory as compared with his, they say "Under section 13, paragraph (4) our jurisdiction over this discrimination is confined to dscriminations between State and interstate rates."

Senator POINDEXTER. They so construe it then as to practically nullify the provision of the interstate commerce act that when they fix a rate that rate must be a reasonable rate. That they fix the rate, and they ignore the requirement that it shall be a reasonable rate.

Mr. BENTON. The situation has worked out in the way that I have suggested. I think the incongruous character of it can not but have impressed the members of the Interstate Commerce Commission. They have seen what an almost impossible, what a wholly impossible, situation they have produced by their orders, and they have tried to remedy it in this peculiar way.

A case came up from Nebraska which I think brought about the attempt of which I am going to speak. In Nebraska all of the interstate and State rates, both passenger and freight, in one single order were advanced, and the carriers were commanded to keep in force the advanced rates until the further order of the Interstate Commerce Commission. Thereby, assuming that order to be valid, the State of Nebraska lost absolutely any legisaltive power in regard to any of its rates. Of course, there are constantly arising many situations where adjustments ought to be made and were made by the State commissions. All such adjustments necessarily ceased when the Federal order took effect. But there came up one situation relating, I think, to a shipment of brick. I may be in error about the commodity. It was necessary to make a change in the rate which the Interstate Commerce Commission had prescribed, if there was going to be a movement. There were shippers who wanted to make the movement. The carriers recognized that the change ought to be made, and both of them applied to the Nebraska commission. The Nebraska commission pointed to the fact that the carriers had procured an injunction against them which prevented them from doing anything with relation to any rate in Nebraska, but told them that they would indicate to the Interstate Commerce Commission their approval of the suggestion which the carriers and the shippers wanted to make. A correspondence was had between Nebraska and Washington, and it extended for a considerable time—how long I don't know. I had nothing to do with it.

My first knowledge of the situation arose from the appearance here in Washington of the chairman of the Nebraska commission, who made a journey from Lincoln to Washington to see if he could help the situation, and he told me that he went before the chairman of the Interstate Commerce Commission and said to him: "Mr. Chairman, we think that our order was right, and that the Interstate Commerce Commission ought not to make the Nebraska rates, but that question is going to be settled judicially. We are not trouble makers. We are down here to help straighten out this situation and see if we can not get a rate into effect in Nebraska which will allow this movement to take place." And the chairman of the Interstate Commerce Commission expressed appreciation of his attitude and a recognition of the anomalous condition which existed, and he said, "We are going to attempt to work out

a way to meet that. It must be done. There must be some way to get changes in these rates."

Chairman Taylor, of the Nebraska commission, was here two or three days, and he went home thinking that he had accomplished something and that the rate would be put into effect. He was told that the commission had devised an amendment which would be made to the Nebraska order—I don't know but it had already then been made; it was made at just about that time—under which it was believed that they could permit changes of that character which it was desired to make. And this is the amendment. It was put into the Nebraska order. It was put by amendment into every preceding order which the Interstate Commerce Commission had made fixing State cases, and has been included in every order since. I find this in the North Dakota order. It has been, as I indicated, included, I think, in every order made by the commission.

Having ordered the advance, the straight percentage advance on interstate rates corresponding to the percentage which was ordered as to interstate rates in Ex parte 74, the commission then goes on to say:

"It is further ordered that nothing in this order shall be construed as requiring the respondent"—that is, the railroads—"or any of them, to establish, to enforce or maintain any rate, fare, or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare, or charge applicable to the transportation of passengers or property in interstate commerce, from, to, or at the same points in effect on the date hereof, or greater than its corresponding rate, fare, or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce."

I never could understand that paragraph, but my understanding of the way it has been applied by carriers is this: That if there is between two points within a State a rate which is higher than the proportional rate between those two points on an interstate movement they may reduce to the level of the proportional rate.

Now, then, if the result of the order of the Interstate Commerce Commission has been to put into effect intrastate a rate which the carriers want to bring down, they can measure it by the part of an interstate rate between those two points, if there happens to be one. If there does not happen to be one and they want to reduce the rate they can come to Washington and file an interstate rate between a point outside the State and one of those points passing through the other, and they can indicate the proportional part of the whole interstate rate which applies between these two intrastate points. Having done that, they have created an interstate rate between those points which may be used as a measure for the intrastate rate, and then make the reduction which they wanted to.

There is, as I understand it, another way also of construing the paragraph, which is that if there is from one of these intrastate points to some other point outside the state a rate which the carrier sees fit to consider as "corresponding" to the intrastate rate that it wants to bring down, which is on a basis lower than the interstate rate, it may take the paragraph as authority to bring it down.

So that by going through that process it was suggested that necessary adjustments might be made in intrastate rates without regard to the fact that the Interstate Commerce Commission had no direct jurisdiction over it.

And Mr. Taylor went back to Nebraska somewhat amazed at the complexity and the ingenuity of the device which had been invented to allow the shippers and carriers in Nebraska to escape from the effects of the interstate order, but expecting that the rates would be put into effect, and it was weeks afterwards—permit me to add this, that I saw him and he told me that they were still struggling, trying to get those rates into effect which everybody wanted to put into effect and nobody objected to.

Senator POINDEXTER. Almost as hard to do as to find out how much taxes a man owes under the law.

The CHAIRMAN. I do not begin to understand that kind of reasoning. I think your explanation makes it worse than it was before. Now, here is the situation: We have no power over intrastate commerce. The Supreme Court has said that under certain circumstances rates within a State may be so connected with and so affect interstate commerce that they really become interstate commerce rates. Now, that is the only theory on which they ought to

construe this bill. And when they make those rates they are just as open to attack as though they had been upon commodities moving from one State to another.

Mr. BENTON. Let me suggest, too, that the device would seem to offer a possible way of escape when everybody was willing, but when the carriers are not willing to make the change the device does not apply very well.

The CHAIRMAN. But, no; the law can only be enforced through the will of both sides affected by it.

Senator LA FOLLETTE. Mr. Chairman, I understand that the other gentlemen who expect to be here are remaining over until another day and are not pressing to be heard to-day.

The CHAIRMAN. In that case we will now take a recess until half past 9, tomorrow morning.

(Whereupon, at 1 o'clock p m., a recess was taken until 9.30 o'clock a. m., Friday, October 28, 1921.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

FRIDAY, OCTOBER 28, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in room 410, Senate Office Building, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. Mr. Benton, will you proceed, or have you some other witness?

Mr. BENTON. Mr. Chairman, Judge R. Hudson Burr, chairman of the Florida commission, is prepared to make a statement this morning.

STATEMENT OF HON. R. HUDSON BURR, CHAIRMAN OF THE FLORIDA RAILROAD COMMISSION, TALLAHASSEE, FLA.

The CHAIRMAN. Will you kindly state your name and your residence and your official relation to this subject.

Mr. BURR. R. Hudson Burr, chairman of the Florida Railroad Commission, office at Tallahassee, Fla. I have been a member of that commission about 19 years; was a member when the carriers asked for the rate increase after having been granted the increase Ex parte 74 by the Interstate Commerce Commission.

I think, Mr. Chairman, that I would probably make it clearer if I would read the order that the Florida Railroad Commission made on the application of the carriers to increase rates last year. It is short and it is in two sections, and I will have to explain the two sections to some extent, and therefore I had better read them. I will omit reading some of the formal part of it.

Skipping the opening paragraph of it, which states the case, I read:

"The application in the main asks for 25 per cent increase in freight rates and in rates for switching and special services, and a 20 per cent increase in passenger fares, excess-baggage charges, and milk and cream rates, and for a surcharge upon passengers in sleeping and parlor cars.

"Pursuant to notice No. 242, dated the 30th day of July, A. D. 1920, the said matter came on for hearing before the railroad commissioners of the State of Florida in their office in Tallahassee, Fla., on August 19, A. D. 1920, at 10 o'clock in the morning, and the commissioners having heard all interested parties appearing and who desired to be heard, took the said matter under advisement.

"At the hearing there was no opposition to the increases asked for by the carriers.

"And now, on this date, the said matter coming on for further consideration and the commissioners being fully advised in the premises,

"Find, that in order to meet the requirements of the provisions of section 15-A of the interstate commerce act the revenues of the carriers must be increased, and that intrastate traffic should bear its part of such increases, and that the carriers are entitled to increase their rates, fares, and charges in the manner hereinafter designated.

"Wherefore, it is considered, ordered, and adjudged by the railroad commissioners of the State of Florida:

"SECTION 1. Effective at the same time the increases authorized by the Interstate Commerce Commission in Ex parte 74, become effective, carriers by rail in the State of Florida will be permitted to increase their freight and passenger rates, fares, and charges on intrastate business within the State of Florida by

the same amounts, and in the same manner prescribed by the Interstate Commerce Commission in Ex parte 74, as applicable to interstate traffic; such increases to continue in force and effect to October 1, 1920, but not thereafter.

"The commissioners will not require the carriers to file any tariffs carrying such increases."

I will depart from the reading to say that there would not be time for the filing, and therefore we waived.

The CHAIRMAN. Well, that would be October 1, 1920. That would be for a month.

Mr. BURR. No; the authorization by section 1, which I have been reading, did not require the filing of tariffs because this order was issued on the 18th day of August, and the rates were to become effective on the 26th, and there could not be time for the printing and filing of all the tariffs.

Senator KELLOGG. No; but what the chairman asked was if the rates were to continue in existence for a month.

Mr. BURR. They were to continue in existence from the 26th day of August to the 1st day of October.

The CHAIRMAN. Well, that is a month and four days.

Mr. BURR. Yes. Now, I will explain section 2 later. I read from section 2 of the order now. [Reading:]

"Carriers by rail in the State of Florida engaged in intrastate business, shall publish and file with the commission, to become effective on October 1, 1920, tariffs covering the transportation of freight and passengers, constructed on the following basis:

"To the intrastate freight rates between points in the State of Florida, as in effect June 24, 1918"—that was the day prior to the director general's order No. 28—"shall be added an increase of 25 per cent. To this result shall be added a further increase of 25 per cent, authorized by this order. The term 'freight rates,' as used in this order is understood to include all charges in connection with the handling of freight traffic that had been authorized and approved by the Railroad Commission of Florida, and in force and effect on June 24, 1918.

"These rates and charges, and all tariffs carrying same, shall be subject to Florida Classification No. 4, and amendments thereto, as in effect on June 24, 1918, and shall be further governed by the rules of this commission applicable thereto, as in force and effect on June 24, 1918.

"All passenger fares may be increased 20 per cent.

"Excess baggage rates may be increased 20 per cent, except that where stated as a per cent of, or dependent upon passenger fares, the increase in the latter will automatically affect the increase in the excess baggage charges.

"Rates for milk and cream carried in passenger trains may be increased 20 per cent.

"A surcharge upon passengers in sleeping and parlor cars may be made, amounting to 50 per cent of the charge for space in such cars; such charge to be collected in connection with the charge for space, and to accrue to the rail carriers.

"Passenger rates and excess baggage rates shall be governed by the rules of this commission, regulating the handling of passengers and baggage, that were in force and effect on June 24, 1918.

"All the foregoing rates shall be governed by the rules of this commission with reference to the disposition of fractions that were in force and effect on June 24, 1918.

"It is impossible at this time to adjust all of the rates on individual commodities. It is conceded by the carriers that readjustments will be necessary. This case shall therefore remain on the docket of the commission for the purpose of making such changes in the rates, fares, and charges as the commissioners may, from time to time, upon their own motion or upon complaint, deem necessary, and for such further orders as may be proper in the premises.

"All matters not disposed of in this order are carried over for further consideration and disposition later.

"It is further ordered that the rates, fares, and charges prescribed in section 2 of this order shall become effective on and after October 1, 1920, and the rail carriers, parties to this proceeding, are hereby required to file tariffs accordingly with the commissioners on or before said date.

"*Done and ordered.*" and so forth.

The CHAIRMAN. Let me see where we stand. You first made an order for these increases taking effect immediately and expiring on the 1st of October.

Then you made an order putting in the same increases applicable after the 1st of October. Why did you do that?

Mr. BURR. Mr Chairman, the purpose of the second section was to wipe out the arbitrary advances or advances by specific amounts which had been made by the director general in his order 28, and orders which followed.

The CHAIRMAN. That is on commodity rates?

Mr. BURR. Yes, sir; they were mainly on heavy grade commodities, where they were advanced in cents per hundred pounds, or in cents or dollars per ton, or in dollars per carload instead of by 25 per cent. They resulted in a greater increase than the so-called 25 per cent.

The CHAIRMAN. I see.

Mr. BURR. So that the second section required the carriers after October 1 or by October 1, to go back to the rate structure as it stood June 24, 1918, and then put upon that the director general's 25 per cent, and pyramid upon that the 25 per cent carried in Ex parte 74. The arbitrary advances that I referred to increased the short hauls on the heavier and cheap commodities very greatly in excess of the 25 per cent, so that the result of going back to the old rates and plus them twice was that the short-haul rates were reduced by this order that I have read, but for the longer distances they were increased, and, as a matter of fact ,are higher than some of the rates in Ex parte 74. The general result of which, we take it, would about even up the gains and the losses; the gains to the carriers would about even up the losses where the reductions took place.

Senator KELLOGG. Let me ask you a question there. Has the Interstate Commerce Commission questioned the effect or legality of your order?

Mr. BURR. Well, they have ordered the carriers to obey the rates in Ex parte 74; yes, sir.

Senator KELLOGG. In Florida?

Mr. BURR. Yes, sir.

Senator KELLOGG. As to intrastate rates?

Mr. BURR. As to intrastate rates, and the order reads that they shall "remain in force until the further order of the commission."

The CHAIRMAN. The Interstate Commerce Commission had not ordered an increase in Florida rates until after your order was entered, had it?

Mr. BURR. No, sir; not until it was entered and disobeyed. That is, complied with by certain carriers, which I will go into later, and disobeyed by others, and after these carriers did not obey the order of October 1, shortly thereafter our commission brought a mandamus proceeding in our supreme court to compel obedience to the order, and immediately the Florida carriers filed a petition with the Interstate Commerce Commission complaining against this order; that it differed from the rates in Ex parte 74, and had become a burden upon interstate commerce, etc.—the usual style of petition that they followed in these cases. The Interstate Commerce Commission finally set it down for hearing; did hear it.

The CHAIRMAN. Well, was that case ever tried?

Mr. BURR. No, sir. I am going to explain something about that in a minute.

Senator KELLOGG. Did the commission make an order on that?

Mr. BURR. An order on our order?

Senator KELLOGG. No; on the petition of the carriers? Did the Interstate Commerce Commission make an order on the petition of the carriers?

Mr. BURR. They did; yes, sir; and it is in No. 11861, "Florida rates, fares, and charges," submitted February 5, 1921, and decided March 8, 1921.

Senator KELLOGG. Will you put that order in?

Mr. BURR. Yes, sir; I am going to put them in. I will file this order that I have just read, if you desire it.

The CHAIRMAN. That may be made a part of the record.

(The order of the Florida Railroad Commission, No. 698, dated Aug. 18, 1920, is as follows:)

Order No. 698.
File No. 4127.

BEFORE THE RAILROAD COMMISSIONERS OF THE STATE OF FLORIDA.

In the matter of a general increase in freight and passenger rates.

In this proceeding the carriers by railroad, subject to the jurisdiction of the railroad commissioners of the State of Florida seek authority to increase their freight and passenger rates and other charges to the extent of the increases

recently granted the carriers by railroad by the Interstate Commerce Commission, in Ex parte No. 74, pursuant to the provisions of section 15-A of the interstate commerce act.

The application in the main asks for 25 per cent increase in freight rates and in rates for switching and special services; and a 20 per cent increase in passenger fares, excess baggage charges and milk and cream rates, and for a surcharge upon passengers in sleeping and parlor cars.

Pursuant to notice No. 242, dated the 30th day of July, A. D. 1920, the said matter came on for hearing before the railroad commissioners of the State of Florida in their office in Tallahassee, Fla., on August 18, A. D. 1920, at 10 o'clock in the morning, and the commissioners having heard all interested parties appearing, and who desired to be heard, took the said matter under advisement.

At the hearing there was no opposition to the increases asked by the carriers.

And now on this date, the said matter coming on for further consideration, and the commissioners being fully advised in the premises.

Find, that in order to meet the requirements of the provisions of section 15-A of the interstate commerce act, the revenues of the carriers must be increased, and that intrastate traffic should bear its part of such increases, and that the carriers are entitled to increase their rates, fares, and charges in the manner hereinafter designated.

Wherefore, it is considered, ordered, and adjudged by the railroad commissioners of the State of Florida:

SECTION 1. Effective at the same time the increases authorized by the Interstate Commerce Commission in Ex parte 74 become effective, carriers by rail in the State of Florida will be permitted to increase their freight and passenger rates, fares, and charges on intrastate business within the State of Florida by the same amounts, and in the same manner, prescribed by the Interstate Commerce Commission in Ex parte 74, as applicable to interstate traffic; such increases to continue in force and effect to October 1, 1920, but not thereafter.

The commissioners will not require the carriers to file any tariffs carrying such increases.

SEC. 2. Carriers by rail in the State of Florida, engaged in intrastate business, shall publish and file with the commission, to become effective on October 1, 1920, tariffs covering the transportation of freight and passengers, constructed on the following basis:

To the intrastate freight rates between points in the State of Florida, as in effect June 24, 1918, shall be added an increase of 25 per cent. To this result shall be added a further increase of 25 per cent, authorized by this order. The term "freight rates," as used in this order is understood to include all charges in connection with the handling of freight traffic that had been authorized and approved by the Railroad Commission of Florida, and in force and effect on June 24, 1918.

These rates and charges, and all tariffs carrying same, shall be subject to Florida classification No. 4, and amendments thereto, as in effect on June 24, 1918, and shall be further governed by the rules of this commission applicable thereto, as in force and effect on June 24, 1918.

All passenger fares may be increased 20 per cent.

Excess-baggage rates may be increased 20 per cent, except that where stated as a per cent of, or dependent upon passenger fares, the increase in the latter will automatically affect the increase in the excess-baggage charges.

Rates for milk and cream carried in passenger trains may be increased 20 per cent.

A surcharge upon passengers in sleeping and parlor cars may be made, amounting to 50 per cent of the charge for space in such cars; such charge to be collected in connection with the charge for space, and to accrue to the rail carriers.

Passenger rates and excess baggage rates shall be governed by the rules of this commission, regulating the handling of passengers and baggage, that were in force and effect on June 24, 1918.

All the foregoing rates shall be governed by the rules of this commission with reference to the disposition of fractions that were in force and effect on June 24, 1918.

It is impossible at this time to adjust all of the rates on individual commodities. It is conceded by the carriers that readjustments will be necessary. This case shall therefore remain on the docket of the commission for the

purpose of making such changes in the rates, fares, and charges as the commissioners may, from time to time, upon their own motion, or upon complaint, deem necessary, and for such further orders as may be proper in the premises.

All matters not disposed of in this order are carried over for further consideration and disposition alter.

It is further ordered that the rates, fares, and charges prescribed in section 2 of this order shall become effective on and after October 1, 1920, and the rail carriers, parties to this proceeding, are hereby required to file their tariffs accordingly with the commissioners on or before said date.

Done and ordered by the railroad commissioners of the State of Florida in session at their office in the city of Tallahassee, the capital, this 18th day of August, A. D. 1920.

R. HUDSON BURR, *Chairman.*

Mr. BURR. And I will also file a supplemental order, No. 701, which was issued on the 28th of August, 1920, to clarify what appeared to us might result in a mistake in that first order, upon switching charges, etc., in terminals where they were not increased 25 per cent by order No. 28 of the director general, but the provision in that order that I have just read from, and which I have just put in the record, we thought, after considering it, might be subject to the interpretation of putting two 25 per cent increases on. Therefore this order No. 701 was simply issued to clarify that, to show that there would be one 25 per cent increase, the 25 per cent increase put on by the Interstate Commerce Commission.

The CHAIRMAN. On terminal charges?

Mr. BURR. Yes, sir; on certain ones. Naming the ones that the Interstate Commerce Commission laid it on. I will file this order No. 701 in the record.

The CHAIRMAN. It may go in.

(Order No. 701 of the Florida Railroad Commission, dated Aug. 28, 1920, is as follows:)

Order No. 701.
File No. 4127.

BEFORE THE RAILROAD COMMISSIONERS OF THE STATE OF FLORIDA.

In the matter of a general increase in freight and passenger rates.

In the matter of order No. 698, dated the 18th day of August, 1920, granting increased freight and passenger rates to carriers by railroad, in pursuance of hearing held under notice No. 242, and in further consideration of the said matter, the commissioners fear that there will be misunderstanding of the language contained in paragraph 2 of section 2 of said order, reading as follows:

"The term 'freight rates' as used in this order is understood to include al charges in connection with the handling of freight traffic that had been authorized and approved by the railroad commissioners of Florida and in force and effect on June 24, 1918."

When this language is read in connection with the language of section 2 of the order it may bear the construction that carriers are authorized to lay a double increase upon switching, demurrage, storage, and other special charges as in effect on June 24, 1918, which was not the purpose of the order.

Wherefore it is considered, ordered, and adjudged by the railroad commissioners of the State of Florida:

That the second paragraph of section 2 of order No. 698 is hereby amended to read as follows:

"To the intrastate freight rates between points in the State of Florida, as in effect June 24, 1918, shall be added an increase of 25 per cent. To this result shall be added a further increase of 25 per cent. To charges for switching, transit, weighing, diversion, reconsignment, lighterage, storage (not including track storage), and transfer as in effect by the rules of this commission on June 24, 1918, shall be added a single increase of 25 per cent. To intraplant, intraterminal, and interterminal switching rates as in effect on June 24, 1918, shall be added an increase of 25 per cent. To this result shall be added a further increase of 25 per cent."

It is further ordered that the said order No. 698 is amended only in the particulars set forth above, effective October 1, 1920.

Done and ordered by the railroad commissioners of the State of Florida in session at their office in the city of Tallahassee, the capital, this 28th day of August, A. D. 1920.

R. HUDSON BURR, *Chairman.*

The CHAIRMAN. Could you tell me at this point what the revenue is for the movement of State traffic in Florida as compared with interstate traffic?

Mr. BURR. I can not give you those figures with any degree of accuracy now, Senator. It has been mighty hard ever since the beginning of Government control to really find out what your State revenues are. We have been trying for years to have an intelligent separation or segregation of the revenues by State lines in order that we would know more accurately what these figures are, and it has grown worse instead of better from the beginning of Government control, and it has not improved so far in the last report received from the carriers. But I should say in per cent that the interstate traffic in Florida is somewhere around 80 to 85 per cent of the whole.

The CHAIRMAN. It does not differ very much from that in other States?

Mr. BURR. No, sir.

Senator FERNALD. There is no strong demand, in your judgement, in your State for Government control of railroads any further, is there?

Mr. BURR. I do not believe that out of a million people you could stir up 5 per cent of the people who would be in favor of it.

Senator KELLOGG. What do you mean by Government control—Government ownership?

Senator FERNALD. No; I mean Government control.

Mr. BURR. The fact of the matter is I do not believe there was a very overwhelming sentiment there in the beginning.

Senator KELLOGG Well, do you mean by that that they are in favor of the abolition of all Federal Government control over rates?

Mr. BURR. Oh, no. I understood the question to mean Government control such as we had during the Railroad Administration when I answered the question.

Senator FERNALD. That is it exactly.

Senator KELLOGG. Well, that is Government ownership.

Mr. BURR. No; as far as that is concerned, Senator Kellogg, I think the people of my State are heartily in favor of the Interstate Commerce Commission being clothed with every legitimate power that they ought to have over interstate commerce, but they are equally interested in being able to control their local commerce.

Senator KELLOGG. Yes. Well, that is what I thought you meant.

The CHAIRMAN. Do you mean to treat as interstate commerce the freight traffic that would come within the Shreveport case?

Mr. BURR. We recognize, Senator, the justice of the Supreme Court's decision in the Shreveport matter thoroughly, and my commission never has and would not knowingly undertake to create a Shreveport case.

The CHAIRMAN. You have no objection to the Federal commission dealing with that traffic which would fall within the principle of the Shreveport case?

Mr. BURR. No, sir; none at all. But on that point, Mr. Chairman, we do believe that, as has been stated here by other witnesses, there is an apparent misunderstanding of the whole situation, and that the Congress ought to make absolutely clear by a clear definition what is meant by the burdens that are placed by State authority on interstate commerce that would create so-called Shreveport cases. Having heard what you said about it, I think it is perfectly clear in your mind, and may be clear in some of our minds; but still, we are like the fellow in jail, you know—we are there and we can not get out.

The CHAIRMAN. You pay me too high a compliment. I am not sure that I could define it.

Mr. BURR. At the time the carriers asked the commission for the increases carried in Ex Parte 74, of course the time was very short, and we had to act quickly. We considered at that time that an emergency existed, and that we should make increases, and make them simultaneous with the effective date carried in the Interstate Commerce Commission's order, and that was our purpose. We heard the application of the carriers on the 18th of August. It did not take much time. We were through by noon, and immediately went to work and issued our order. We stayed there, and notified the carriers' representatives that if they desired to remain that it was our purpose to get this order out before we left our office that day, and we did. And we realized that we could

not make the changes between the 18th and the 26th of the month which are carried in that order effective August the 1st, because it would be an impossibility for the carriers to get out tariffs and put them in effect, and we wanted to give them a reasonable time to file those tariffs.

As to passenger rates, you will observe that the order carried every passenger rate that the Interstate Commerce Commission carried. It carried the baggage rates and it carried the milk rates. All those were the same as Ex Parte 74. The principal changes, as I stated, were in these arbitraries made by the director general.

We asked the carriers if they would not undertake to justify the rates that they asked for. They said they could not do that and it was not their purpose to do it; that they were not prepared to do it, and simply offered as to why we should grant these rates the testimony taken in Ex Parte 74 before the Interstate Commerce Commission.

The CHAIRMAN. That is, the carriers took the position that the changes in the State rates should in every case be exactly like the changes that have been made in the interstate rates?

Mr. BURR. Absolutely.

The CHAIRMAN. Without any showing at all about the situation in Florida?

Mr. BURR. Without any showing at all. Mr. Charles R. Capps, vice president of the Seaboard Air Line, was the spokesman for those roads appearing before the commission, and he absolutely had no figures to show what was needed in the State of Florida or what the effect on the traffic in the State of Florida would be by the advances made by the Interstate Commerce Commission.

Senator FERNALD. I judge no attention was paid to any evidence that you may have brought before the Interstate Commerce Commission as State commissioners. No regard was paid to that, was it, in any case or from any State? Any suggestions that you as a commission may have made to the Interstate Commerce Commission were disregarded?

Mr. BURR. Do you mean after our order was issued?

Senator FERNALD. Yes.

Mr. BURR. Well, we went pretty fully into it, I think. Some three or four days of testimony was taken in Florida before Judge Woolley, who was then a member of the Interstate Commerce Commission, and some examiner who sat with him, and it appears to us, in view of the order that was issued by the commission, that there was not much attention paid to what was put in, because the case was built by the carriers upon imagination pure and simple. The rate comparisons were built upon what we know as paper rates upon commodities that do not move, and all that sort of business. And, of course, they made a showing in exhibits built upon that basis, and the Interstate Commerce Commission's attention was called to it, but, apparently, they did not give any credit to it.

The CHAIRMAN. If I gather it, there would not have been any substantial difference in the revenue derived by the companies on the State rates which you put in and the revenue derived on the rates which the Interstate Commerce Commission put in?

Mr. BURR. Senator, I do not believe there would have been a difference on all the traffic of all the roads in the State of Florida of $100,000. I think it would have been under it. Our purpose was to iron out what looked to us like inequalities. It disturbed what we thought was a proper alignment of the rates.

Now, I want to say at this point that the Florida East Coast Railroad, which is the third biggest road we have in the State in point of mileage, was absolutely satisfied with the order of my commission. Mr. Kirtland, who is in charge of all the traffic of that road, told me that his road was perfectly satisfied with the order and would publish and file the rates as required by the order, and they did. He said further that he was in accord with the cutting out of the specific advances and applying a percentage increase; that he thought them wrong when the director general made them.

Senator TOWNSEND. When what?

Mr. BURR. When the director general made these specific advances. He said also that his company was invited by the Atlantic Coast Line, the Seaboard Air Line, and others that were preparing to petition the Interstate Commerce Commission to attend a conference to attack the order of the State commission and join them in the petition, but that their company declined to attend or to take any part in making the complaint whatever. And at the hearing upon the petition of the carriers to set aside our order the Florida

East Coast Railroad did not appear, either by a traffic official or by an attorney, and in the meantime operated under these rates.

There were some other smaller lines, quite a number of smaller lines, that did not complain of our order, and published them, and they were in effect. But they were all made by the Interstate Commerce Commission parties in the proceeding upon which Commissioner Woolley took the testimony.

Senator FERNALD. And your order, the order of the State commission, was apparently entirely disregarded?

Mr. BURR. Yes, sir; it was by the carriers that prepared this petition. It was absolutely disregarded. And it has been set aside by the order of the Interstate Commerce Commission made later.

Senator TOWNSEND. Were there any questions involving the discriminations about which you complained? Was this particular road exempt from those, and did they apply to other roads? That is, I mean by that——

Mr. BURR. Those arbitraries?

Senator TOWNSEND. Yes.

Mr. BURR. They applied to all the roads.

Senator TOWNSEND. Well, did they affect this particular road less than they did the other roads?

Mr. BURR. Why, I think at least on one commodity, one heavy commodity that moves in quantity on the Florida East Coast Railroad, it was affected more by our order than the other lines, and that is rock.

Senator TOWNSEND. I didn't know but that there might be some conditions that maintained on the Florida East Coast Railroad that were not common to the other roads, and they might therefore not be affected by your order as much as the other roads.

Mr. BURR. No, sir; there was no material difference in that except that I say they have quite a heavy movement of rock, heavier than the other roads do. Rock is mined at Miami or near Miami and shipped all along that road.

Now, with reference to the Florida East Coast Railroad, our commissioners flattered themselves that they had issued a mighty reasonable order, when that road comes up and says, "We are satisfied with it. It is a reasonable order. We think it is correct." Because we had had a number of lawsuits with that road in the past in enforcing rate orders before these emergencies came on, and more so than with some of the lines that were petitioning the Interstate Commerce Commission, so that, as I say, we felt very much flattered when we found that that line said the order was a reasonable one.

At the hearing by the Interstate Commerce Commission in Florida held by Commissioner Woolley I called his attention to the fact that the Florida East Coast Railroad was not a petitioner to set aside this order, that they were satisfied with it as a whole. He said that did not make any difference.

Senator STANLEY. Is that the road Flagler built?

Mr. BURR. Yes; it is the Flagler system. Commissioner Woolley said that made no difference; that the Interstate Commerce Commission had made them parties. I called attention to one or two other smaller lines that had not joined in this petition, and he made the same answer. And when the Interstate Commerce Commission's order was finally issued they required the Florida East Coast Railroad and other roads that were obeying the order of the State commission and had put the rates in to raise those rates to the level of the Interstate Commerce Commission's order in Ex parte 74.

The CHAIRMAN. I suppose the Florida East Coast Railroad physically lies altogether within the State of Florida, as I understand it—doesn't it?

Mr. BURR. Yes.

The CHAIRMAN (continuing). Yet it does as large a proportion, practically, of interstate business as any of the other railroads.

Mr. BURR. Yes, sir.

The CHAIRMAN. And it was willing to adopt your rates?

Mr. BURR. Yes, sir; absolutely. And this was testified to before the Interstate Commerce Commission that that was the position of their traffic man.

Senator STANLEY. For my information—I did not come in at the beginning of the hearing—were you reviewing the rail rates or both rail and water rates in this instance? I understand a great deal of the traffic, or the bulk of the traffic, of this Flagler system is between Florida and Cuba. I understand that a great portion of it is.

Mr. BURR. Well, our order did not affect those rates in the slightest. They are interstate and foreign rates, anyhow, and are covered by the Interstate Commerce Commission's order.

Senator STANLEY. You do not have anything to do with that?

Mr. BURR. No. Now, as to water rates and boat rates in Florida, our commission has increased the water carriers from time to time as these increases have been made over the country.

Senator STANLEY. You mean you made the water carriers raise their rates?

Mr. BURR. The carriers under our jurisdiction on inland waterways in the State of Florida. Now, those matters do not come before the Interstate Commerce Commission at all.

At the hearing conducted by Commissioner Woolley we again insisted that the investigation go into the justness and reasonableness of the rates that were attacked, and we failed absolutely in getting the commission to go into that phase of it. The carriers went on and put in voluminous exhibits, as I said a while ago, built upon imagination, but it would take time to analyze and properly criticize and show to the commission just the faults in those exhibits. So that at the end of the carriers' testimony we asked the commission to recess for ten days or two weeks—some reasonable time—that our men could examine these exhibits in order to be better prepared to criticize them or to cross-question their witnesses. We were not permitted any time, but were compelled to go on immediately. So that there was no entering into the determination of whether those rates were just and reasonable rates or not. They seem to have proceeded wholly upon the theory that if there was a difference in the rates, intrastate with interstate, that a burden on interstate commerce existed. I suppose that is what they concluded.

Now, for instance, to give you an idea of some of the comparisons that the exhibits made. In their exhibit numbered 8 it is shown that order 698—that is, a State order—makes radical reductions in the rates on cotton, cotton linters or re-gins, and the figures taken by themselves look formidable. Evidence in the case showed that so little cotton linters or re-gins moved intrastate in Florida that the figures merely constituted paper comparisons.

I will give you some cotton figures a little later on.

The CHARMAN. That is the cotton rate; so far as Florida is concerned, it is rather immaterial, isn't it?

Mr. BURR. Absolutely. They made up another exhibit and put in a whole lot of testimony making comparisons in Florida with rates in other places on dolomite. I don't know what it is. I never have been able to find out what it is, and I have not found a single man in the carrier group, or anybody else, that knows what it is, and our attorney said that when he argued this case before the Interstate Commerce Commission he got quite a laugh over what it was.

Senator TOWNSEND. Well, it is not anything that they manufacture and produce in such quantity in Florida that it moves?

Mr. BURR. No. It isn't anything that is manufactured and produced in Florida, absolutely not in the State of Florida—that is, it is not reported among the commodities by the carriers in Florida.

The CHAIRMAN. We will have to go to a tariff man to find out what dolomite is.

Mr. BURR. Well, we couldn't find out in a dictionary that we had around in our office what it is. Do you know what it is?

The CHAIRMAN. Yes; I know in a general way what it is. I would not be able to identify it if I should see it.

Mr. BURR. This same exhibit went on to show, for the information of the Interstate Commerce Commission that the enforcement of our order would result in reductions of the rate on lime for the 10-mile haul, but failed to show that it made increases when they got above 30 miles. So that was the way these exhibits were made up, and the Interstate Commerce Commission's attention was fully called to that matter when the case was argued and briefed.

Senator TOWNSEND. Well, is it a fact that you haul much lime down there by train for 10 miles?

Mr. BURR. Not a great deal for 10 miles; no, sir. It would be a mighty small movement for 10 miles. It would average 100 miles and over, the bulk of it.

Senator TOWNSEND. And your rates increase then over 10 miles?

Mr. BURR. Yes, sir; they increase when they get above 31 miles.

Senator KELLOGG. Let me ask you right there: Were your rates built on a mileage basis?

Mr. BURR. Yes, sir; they have been built on mileage basis all the while, except commodity rates, which have been voluntarily made by the carriers and

filed with the commission, which became lawful rates and could not thereafter be changed without application and showing to the commission.

Then they fixed up an exhibit on sand. Well, now, some of you gentlemen have been in Florida. You can get sand most anywhere in Florida, you know, and the comparisons made on sand are ridiculous. And the only place where they complained there was on the short hauls again. Well, sand can be gotten locally. There is going to be very little long-haul sand. There is one point in Florida which has some long-haul sand, and that is Lake Weir, because there is a sand dredged from the bottom of that lake that is very fine for certain purposes, but it is expensive to ship it for great distances, and it is only shipped for purposes that it is absolutely necessary to use it for.

Now, they made up a great exhibit on gravel. There is only one little bit of a spot about 100 acres in the State of Florida that there is any gravel on, and the cost to ship it any distance would be prohibitive. It is not a grade of gravel that would be desirable to ship any great distance. If the parties wanted gravel, they would probably go to Alabama or Tennessee and get it because of the superiority of the gravel.

The CHAIRMAN. Well, your point is that the rate on gravel could not discriminate against interstate commerce at all?

Mr. BURR. No, sir. Now then another one of their exhibits draws a comparison of rates on cotton to Jacksonville, Fla., under our order as against the present rate from the same points to Savannah, Ga., on the basis of Ex parte 74. This exhibit was purely academic. The reason is that it appears from the evidence in the record in this case that aproximately 98 per cent of the cotton raised in Florida moves interstate. It moves out of the State. From the reports of the carriers to the commission it appears that the intrastate movement of cotton is so small that the revenues of carriers would not be seriously affected had our order made reductions amounting to 50 per cent or greater in the rates.

To compare rates on cotton in Georgia—they made comparisons with the Georgia rates—with rates on cotton in Florida is about on a parity with comparing the phosphate rates in Florida with phosphate rates in Georgia, which they did. Florida mines over 50 per cent of the phosphate used in the world, as I understand it.

Senator STANLEY. Not in the world?

Mr. BURR. We produce nearly all of the high-grade phosphate that is produced in this country. There is some low-grade rock that used to be shipped out of Tennessee.

Senator STANLEY. Do you mean to say that the phosphates mined in Florida are a considerable part of the phosphates of the world?

Mr. BURR. That is, when there is a normal movement, and before the war Florida supplied something over 50 per cent of the world's needs in phosphate rock.

Senator STANLEY. I was under the impression that the German production of phosphate was high.

Mr. BURR. They do not produce any, sir. We sell it to Germany. Germany was the biggest buyer of Florida phosphate rock in the world before the war.

Senator KELLOGG. Germany, France, Spain, and all those countries?

Mr. BURR. It is a matter of common knowledge that Florida furnishes practically all the phosphate produced in this country, while Georgia does not mine one pound; and yet a great big exhibit was built on a comparison of phosphate rates in Florida with phosphate rates in the State of Georgia. The Interstate Commerce Commission's attention was drawn to that forcefully, both by the questioning of the witness at the time that spoke for the carrier and in the arguments afterwards. Why, it stands to reason, with the great volume of that business in Florida, that the rate would be cheaper per ton per mile than it would be in the State of Georgia that does not produce a pound of it. It ought to be. The bulk, however, of this phosphate goes interstate and foreign, and therefore the Florida commission's order would not affect it. It would only be that amount of phosphate that would move to an acid plant for acidulation and to be converted into acid phosphate.

Senator KELLOGG. Have you got any acid plants in Florida?

Mr. BURR. Yes.

Senator KELLOGG. Where are they?

Mr. BURR. There is one at Pensacola, one at Fort Inglis, Fla., and there are two at Jacksonville.

Senator KELLOGG. Have they any acid plants in Georgia?

Mr. BURR. Yes, sir; they have got more acid plants in Georgia, I presume, than we have in Florida.

Senator KELLOGG. But all the phosphate rock moves interstate?

Mr. BURR. The bulk of it, as I say, moves interstate and foreign.

Senator KELLOGG. But I mean to have it in Georgia.

Mr. BURR. Yes, sir; it moves interstate; yes, sir.

Now, on the cotton comparison I want to show how ridiculously their figures were built on that. Georgia is the greatest cotton State in the Union with the exception of Texas, and according to the Department of Agriculture's report for 1917, Georgia produced 1,820,000 bales as against a production for the same year, in accordance with the same report, in the State of Florida of 40,000 bales. In addition, Georgia has numerous cotton mills which create intrastate movements in Georgia, while Florida has no cotton mills, with the possible exception of one small knitting mill, which necessitates the shipping of practically all cotton raised in Florida in interstate commerce. There is a little knitting mill at the city of Ocala, which is run by a negro, which mill makes some coarse socks—work socks. That is about the extent of the cotton-mill business in Florida.

The CHAIRMAN. I suggest, Mr. Benton, that it is quite apparent that so far as Florida is concerned, at any rate, the Interstate Commerce Commission did not stop to consider any case of actual discrimination, and I would not, if I were you, extend the record very much by giving individual instances.

Senator KELLOGG. Let me ask you, Judge, a question. You recognize the correctness, as I understood you, of the Shreveport and the Illinois cases, those two cases?

Mr. BURR. Yes, sir; where there is an actual existence of such a condition. But I would like to put this proviso to my answer, and that is that there must be proof in these cases, not mere allegation of the carrier.

Senator KELLOGG. Quite so. I recognize that. Now, the substance of those decisions, and especially the Illinois case, which was a little more specific, was that where an intrastate rate discriminated against an individual or community, that the Interstate Commerce Commission had the power to declare the discrimination illegal. That is the substance of those decisions, isn't it?

Mr. BURR. I think so; yes, sir.

Senator KELLOGG. Yes. Presumably they should base that finding of discrimination upon such evidence as the commission has a right to take, but it should be based on evidence; that is your claim?

Mr. BURR. Yes, sir. And let me say that the evidence ought to go both to the reasonableness of the interstate rate, and also the State rate, because you take in the original Shreveport case, for instance, there was no determination arrived at to find out whether the Texas rate was a just and reasonable rate or not.

Senator KELLOGG. Now, of course we meet in legislation with a legal difficulty, for under the Constitution of the United States where a State regulation conflicts with a Federal regulation, or a Federal regulation conflicts with a State regulation, the Constitution of the United States has committed the decision of that to but one body, and that is the United States; isn't that true?

Mr. BURR. I guess you are correct, Senator.

Senator KELLOGG. Yes. Now, there we strike a difficulty in legislating. In other words, it is the province of the Federal Government to decide whether a particular rate, intrastate rate, conflicts with an interstate rate, and about all Congress can do is to follow those decisions and hedge them around with regulations so that there must be an actual discrimination, but the decision of that must rest somewhere in a Federal tribunal, isn't that true?

Mr. BURR. I guess that is correct.

Senator TOWNSEND. Well now, what you are contending for, as I understand, even in that condition where the Government sets up a body like the Interstate Commerce Commission to pass upon those things, it is at least presumable that it will take into consideration the evidence in the case and consider the State authorities before it determines that question.

Mr. BURR. Yes, sir. And that they will not assume power that apparently has not been granted, which seems to have been the case in all these State cases last year. They have certainly gone far beyond what a great many very able lawyers thought that the law called for.

Now, I was saying that we tried to get into the merits, that is, to get them to go in and justify their position before the Interstate Commerce Commission.

Here is some language that I am going to read from the Interstate Commerce Commission's order in our case. [Reading:]

"Because of the magnitude of the undertaking respondents have not attemped to estimate in dollars and cents the loss of revenue which would result from a compliance with section 2, of the Florida commissioners' order. However, we do not regard as controlling the exact extent to which their revenues will be adversely affected."

In other words, the question of whether they are losing revenue, as I understand from this, is a small matter in setting aside our order.

The CHAIRMAN. I understand you to say that.

Mr. BURR. I will place in the record the report of the Interstate Commerce Commission in No. 11861, "Florida rates, fares, and charges," which is as follows:

[6694. Interstate Commerce Commission. No. 11861. Florida rates, fares, and charges.]

In the matter of intrastate rates, fares, and charges of the Atlantic Coast Line Railroad Co. and other carriers in the State of Florida. Submitted February 5, 1921. Decided March 8, 1921.

Certain rates and charges prescribed by the railroad commissioners of the State of Florida, and charged by several steam railroads for intrastate transportation in Florida, found to result in undue prejudice to shippers of interstate traffic, in undue preference of shippers of intrastate traffic, and in unjust discrimination against interstate commerce.

Thomas W. Davis, W. N. McGehee, and Frank W. Gwathmey for the steam carriers.

Charles E. Cotterill for International Agricultural Corporation, Swift & Co., American Cyanamid Co., Phosphate Mining Co., Coronet Phosphate Co., and Charleston Mining & Manufacturing Co.

James E. Calkins for railroad commissioners of the State of Florida.

REPORT OF THE COMMISSION.

DANIELS, Commissioner: This case involves certain intrastate freight rates and charges of steam railroads in Florida, which are alleged to be unlawful in their relation to the interstate rates and charges of the same carriers. Passenger fares are referred to in the above title and in the order instituting the investigation, but it developed at the hearing that no question was presented with respect to them.

In Increased Rates, 1920 (58 I. C. C., 220), and Authority to Increase Rates (58 I. C. C., 302), hereinafter referred to as Ex parte 74, decided July 29, 1920, this commission, under authority conferred upon it by the interstate commerce act, divided the country into four rate groups, namely, eastern, southern, western, and mountain-Pacific. These groups, in our view, represented a proper division of the country for the purposes of considering the financial condition of the carriers and fixing upon a general increase in rates. In the southern group, which includes the State of Florida, the increase allowed in charges for freight services was 25 per cent. It was our conclusion that this, together with other increases permitted, would result in transportation charges "not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and one-half of 1 per cent in addition." In reaching this conclusion we anticipated that the various State authorities would authorize corresponding increases, as most of them have since done.

Tariffs were filed establishing the new rates, fares, and charges, interstate, effective in most instances August 26, 1920. By authority of the railroad commissioners of the State of Florida, contained in an order, dated August 18, 1920, the intrastate rates, fares, and charges were increased at or about the same time in amounts corresponding to those authorized by us for interstate traffic. The Florida commissioners' order was in two sections. Section 1 provided in substance that the intrastate rates, fares, and charges, increased

as above stated, should continue in effect until October 1, 1920, but not on or after that date in cases where section 2 of the order provided otherwise. Section 2 directed the carriers to maintain, on and after October 1, rates for freight services on the basis of the rates in force on June 24, 1918, immediately prior to the effective date of general order No. 28 of the Director General of Railroads, plus 25 per cent, plus a second 25 per cent. Most of the intrastate rates established under section 1 of the order conformed to the requirements of section 2, but rates, principally on heavy low-grade commodities, which under general order No. 28 were increased by stated amounts in cents per 100 pounds instead of 25 per cent, were in some instances to be substantially reduced and in others substantially increased. Under general order No. 28 the short-haul rates on these commodities had been subjected to much more than a 25 per cent increase, and the long-haul rates to less than a 25 per cent increase, and the main purpose of the Florida commissioners' order was to distribute the increases evenly and limit all rates to an increase of 25 per cent before applying the second 25 per cent. Among the commodities thus affected are brick, cement, plaster, lime, sand, gravel, rough stone, petroleum and its products, and cotton.

It is testified that the further effect of section 2 of the Florida commissioners' order is to require the cancellation of the minimum charge of $15 per car, applicable to carload shipments in other than switching movements; also the minimum charge on less-than-carload shipments and the minimum class-rate scale established under general order No. 28; also to render inapplicable the standard uniform packing specifications for fruits and vegetables established by the director general, and thus reinstate such requirements as were in force prior to Federal control; and to nullify other measures, said to be of a constructive character, inaugurated by the director general, as it restores the Florida commissioners' freight classification as in effect June 24, 1918. In short, it appears that, except for the 25 per cent increase, all changes made by the director general in rates, charges, rules, regulations, and classification ratings are abrogated.

After the order of the Florida commissioners was promulgated the steam railroads of the State filed with us a petition, alleging that the action of the Florida commissioners would result in undue prejudice to shippers and localities outside the State and in unjust discrimination against interstate commerce, and we thereupon instituted this proceeding of investigation in accordance with the provisions of section 13 of the interstate commerce act for the purpose of determining what rates and charges, if any, or what maximum or minimum, or maximum and minimum, should be prescribed to be charged by the respondent carriers in order to remove such undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or such undue, unreasonable, or unjust discrimination against interstate commerce, as might be found to be caused by the rates and charges made or imposed by the authority of the State of Florida.

It is testified that the following carriers have complied with the Florida commissioners' order: Apalachicola Northern Railroad Co.; Birmingham, Columbus & St. Andrews Railroad Co. and A. D. Campbell, receiver; Charlotte Harbor & Northern Railway Co.; Fellsmere Railroad; Florida East Coast Railway Co.; Gulf Coast Railway; Live Oak, Perry & Gulf Railroad Co.; Ocklawaha Valley Railroad Co. and H. S. Cummings, receiver; Ocala & Southwestern Railroad Co.; Tavares & Gulf Railroad; Georgia & Florida Railway and W. R. Sullivan, John F. Lewis, and L. M. Williams, receivers; and South Georgia Railway Co. The other Florida steam carriers, or at least most of them, have failed to comply with section 2, and are still maintaining intrastate rates and charges bearing increases corresponding to those applied interstate under Ex parte 74. These carriers say that they found it impossible to comply with section 2 of the order by October 1 and finally decided to resist it. The Florida commissioners accordingly instituted mandamus proceedings in the Supreme Court of Florida to compel compliance, but so far as we are advised the case has not been disposed of. Relying upon a decision of the Supreme Court of Florida in Florida East Coast Ry. Co. v. State (83 So. Rep. 706), the carriers in default take the position that they have a right to test the propriety of the State commissioners' order before complying with it. Whatever the merits of that question may be, a state of facts is before us in the instant case, with which we should deal.

Most of the rates in Florida on the commodities in question appear to be on a mileage basis. The scales are divided into 5 or 10 mile blocks, and the rates progress with distances. Generally a different rate is provided for each block, but in some instances, particularly for the longer hauls, a common rate applies to several blocks. We may note the effect of section 2 of the Florida commissioners' order on several of the scales:

Commodities.	Generally reductions for—
Brick and rough stone	380 miles and less.
Cement and plaster	70 miles and less.
Lime	30 miles and less.
Sand	120 miles and less.
Gravel	90 miles and less.
Gasoline and other refined oils	20 miles and less.
Cotton	All distances.

For greater distances than those shown there are increases in practically every rate. The information appears in more detail in appendixes 1 to 7 to this report. The rates shown are taken from the Florida commissioners' exhibits; the data submitted by the carriers do not fully or correctly portray the situation.

According to the record, the commodities named constituted, in 1919, the following percentages of the intrastate traffic of the principal Florida carriers:

	Cotton.	Cement, brick, and lime.	Stone, sand, and similar commodities.	Gasoline and other refined oils.
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*
Atlantic Coast Line R. R	0.06	2.29	8.3	9.83
Florida East Coast Ry	.....	4.5	25.9	7.1
Seaboard Air Line Ry	.1	2.4	8	3.3
Georgia Southern & Florida Ry	.2	2.8	1.2	1.3

Some of these commodities move in slight volume, as will be seen from the above table, but most of them enter very largely into the commercial life of the State, and the movement is substantial.

Fuel oil, one of the commodities affected, moves from and to certain points in Florida on commodity rates made to meet peculiar conditions. There is a heavy movement from Tampa, Fla., to the phosphate beds in the Bone Valley district, about 50 to 60 miles distant. For about 16 years prior to the period of Federal control the rate was 64.5 cents per ton. The evidence is that this was a very low rate established to assist the industry. As a result of the increases made under general order No. 28 and under section 1 of the Florida commissioners' recent order, the rate became $1.875. The reduction required under section 2 of the order would result in a rate of $1.01 per ton. Since the movement of this traffic is heavy the revenue loss would be considerable.

This proceeding relates primarily to the rates made or imposed by authority of the State of Florida but, as above shown, as a result of section 2 of the Florida commissioners' order the rates for application within that State initiated by the President through the director general during the period of Federal control are also involved in the consideration of this issue, and our jurisdiction extends to such rates. The carriers content that the increases in cents per 100 pounds made by the director general were not unreasonable. It is said to have been the view of the director general that short-haul traffic was not bearing its proper proportion of the transportation costs, and that therefore he concluded that the disproportionate increases on that traffic were justified. There is also evidence from the carriers to the effect that the director general did not intend that the increases in cents per 100 pounds should approximate 25 per cent. One of the director general's principal assistants in traffic work, who was familiar with the circumstances and conditions considered in connection with the preparation of general order No. 28, testified that the increases in cents per 100 pounds there provided for on heavy-moving commodities were determined before it was decided what percentage increase would be applied to rates in general.

To sustain the increases in cents per 100 pounds made by the director general the carriers refer to Virginia Iron, Coal & Coke Co. *v.* Director General (58 I. C. C., 583), wherein we found justified rates on iron ore from points in Tennessee, Georgia, North Carolina, and Virginia to Middlesboro, Ky., which had been subjected to flat increases of 30 cents per ton under general order No. 28, in addition to some increases made a short time previous. In general, the rates were for hauls of about 10 to 300 miles. The increases due solely to the addition of 30 cents per ton ranged from 136 per cent for the shorter hauls to 27 per cent for the longer hauls. The total increases ranged from 194 per cent to 48 per cent.

The minimum carload charge inaugurated by the director general does not apply to most of the heavy and low-grade commodities, but does apply to practically all other carload traffic. Its cancellation effects reductions generally for hauls of 50 miles and less. The cancellation of the minimum class-rate scale and the minimum charge for less-than-carload shipments, established by the director general, operates to reduce the charges for short hauls. The less-than-carload rates on ice would be materially reduced for considerable distances. Not a great amount of revenue is derived from these minimum rates and charges. Incidentally, it may be observed, they are substantially the same as apply to intrastate and interstate traffic everywhere else in the United States.

The record affords several specific examples of how shippers and localities outside the State are or would be directly and injuriously affected by section 2 of the order. Fuel oil moves in considerable quantity from Jacksonville to Jamieson, Fla., about 186 miles, where it is used in the manufacture of fuller's earth.

A large plant for the manufacture of the same commodity was recently erected at Attapulgus, Ga., about the same distance from Jacksonville as is Jamieson. The same railroad serves both consuming points. The present rate on fuel oil from Jacksonville to both points is $3.625 per ton, but under section 2 of the order the rate to Jamieson would be reduced 50 cents, affording the manufacturer at that point an advantage of about $15 per car.

There is quite a heavy movement of brick in Florida. About 60 per cent of the traffic is intrastate, and the hauls are generally short. The reductions ordered by the Florida commissioners are therefore of considerable consequence. Producers outside the State compete with those within the State, and are threatened by the advantages afforded the latter by the Florida commissioners' order. For instance, brick is produced at Bainbridge, Ga., and Yeager, Fla. Under section 1 of the order, brick from Bainbridge to Jamieson, 10 miles, is charged $18 per car, while that from Yeager to Jamieson, 10 miles, pays $14.50 per car. Under section 2 of the order a shipment from Yeager would pay but $7.82 per car.

There is a limited production of cotton in northern Florida. Besides a movement to ginning points in the State there is a movement to Jacksonville, which city has recently increased its facilities for handling the commodity and seeks to become a market of importance. North of Jacksonville are Savannah and Brunswick, Ga., to which ports the rates from Florida were increased 25 per cent under Ex parte 74 without any subsequent reductions. There is great rivalry among the various ports and the carriers have heretofore maintained what they regarded as a proper alignment of rates, and for aught that appears it was satisfactory to the parties concerned therewith. So far as cotton is concerned the Georgia commission recently denied a 25 per cent increase, which held the rates from Georgia points to the ports of the State to the basis in effect during Federal control. That matter coming before us, we have held that the intrastate rates should be increased in amounts corresponding to the increases made in interstate rates and now in effect under Ex parte 74 to avoid undue prejudice and unjust discrimination against interstate commerce. (Georgia Rates, Fares, and Charges, 60 I. C. C., 527.) The carriers submit that there is no good reason for now favoring Jacksonville with lesser increases than the other ports.

The carriers contend that due to the shape of Florida and the fact that most of the commodities in question are heavy and of low grade, the hauls are generally for the distances to which the rates reduced under section 2 of the Florida commissioners' order would apply; that the railroads are so located that the traffic does not move for the long distances between the western and southern portions of the State but that from either section it moves more frequently across the State, the rate of out of Georgia or Alabama, time

becoming an interstate movement before any great distance is reached; and that the revenue loss required on the short hauls is not offset by the increases for long hauls. The Florida commissioners contend that the changes required, taking into consideration the increases as well as the reductions, will result in comparatively little, if any, loss in the carriers' revenue, and that the intrastate rates as a whole will not affect interstate commerce injuriously to any considerable extent.

Because of the magnitude of the undertaking respondents have not attempted to estimate in dollars and cents the loss of revenue which would result from a compliance with section 2 of the Florida commissioners' order. However, we do not regard as controlling the exact extent to which their revenues will be adversely affected. The fair conclusion from the whole record is that, taking the commodities in question as a whole, the increases granted by the Florida commissioners for the longer hauls will not produce revenue sufficient to equalize the reductions required on the shorter hauls, and we so find. In this connection it is significant that the rate expert of the Florida commissioners, in testifying at the hearing before the Florida commissioners on the carriers' applications for increases corresponding to those authorized by us in Ex parte 74, the record of which hearing before the Florida commissioners has been made a part of this record, took the position that the specific advances as applied under general order No. 28 laid a heavy burden on short-haul traffic "or that traffic which in intrastate commerce constitutes the most of the business," and that the intrastate traffic was "necessarily short-haul traffic." Similar specific increases were made by the director general in all other States on intrastate and interstate traffic and in our decisions in numerous cases and in Ex parte 74 we have recognized their propriety in general.

In Florida we find no conditions which suggest the propriety of any lower basis of charges for short-haul traffic than is maintained elsewhere in the same general section of the country; in fact, the record shows that the Florida commissioners have in the past recognized that the transportation conditions in Florida justify a relatively higher level of rates in Florida than elsewhere in the South.

Section 2 of the Florida commissioners' order creates a rate structure intrastate materially different from that which applies interstate, resulting in injurious disparities, examples of which have hereinbefore been given, obviously also resulting in discrimination against intrastate shipments involving long hauls. As said in Intrastate Rates within Illinois (60 I. C. C., 92, 102):

"The rates to and from the various points on any given commodity, both State and interstate, local and joint, are closely related and interrelated, and the creation of material differences between them is subversive of established and sound economic and commercial conditions, resulting in a situation which could not reasonably be approved."

And, as we poined out in Nebraska Rates, Fares, and Charges (60 I. C. C., 305, 313), "differences in judgment among the several State commissions, if each could and would create a rate group of its own, would obviously nullify the fundamental purposes of the transportation act." The effect of the Florida commissioners' order is to treat Florida as separte and distinct from the other States in the southern group and to require a different scheme of rate making. A general compliance with that order would obviously result in a serious disruption of the rate structure in Florida and indirectly in other parts of the southern group.

The carriers' petition, alleging that unlawful disparities would result from a compliance with section 2 of the Florida commissioners' order, states that it is filed on behalf of certain named steam carriers and all other steam carriers subject to our jurisdiction operating in Florida, and our order instituting this investigation embraces all the carriers. However, the Florida East Coast Railway, which is one of the lines that complied with section 2 of the order, has never taken any active interest in the efforts of the other carriers toward the restoration or continued maintenance of the increased rates authorized by section 1, for the reason that it did not consider that it was substantially affected by the order of the Florida commissioners. Increases authorized by us for interstate traffic have been made by the Florida East Coast, but coorresponding increases have not been made on intrastate traffic.

We are of opinion and find that the increases made by the carriers in rates and charges for freight services under our decision relating to the southern group in Ex parte 74, and now in effect, taken in connection with the present

interstate rules, regulations, and classification ratings, and including the minimum carload charge, the minimum less-than-carload charge, and the minimum class-rate scale, result in reasonable rates and charges for interstate transportation within said group, and that the failure of the respondent carriers by steam railroad within the State of Florida which complied with section 2 of the Florida commissioners' order to continue the maintenance of corresponding increases in their intrastate rates and charges, as represented by the rates and charges in effect September 30, 1920, which were 25 per cent higher than those in effect on the date of our decision in Ex parte 74, has resulted and will result in unjust discrimination against interstate commerce and in undue prejudice to shippers of interstate traffic, and undue preference of shippers of intrastate traffic.

We further find that said unjust discrimination and undue prejudice and preference should be removed by making and maintaining increases in the intrastate rates and charges for freight services in force on the date of our decision in Ex parte 74, without reducing the minimum carload charge, the minimum less-than-carload charge, and the minimum class-rate scale in effect on said date, which increases shall correspond to the increases heretofore made as aforesaid by said respondents under Ex parte 74 and now in effect in their interstate rates and charges in the southern group.

The above findings are abundantly supported by the facts of record. They are without prejudice to the right of the authorities of the State of Florida, or of any other party in interest, to apply in the proper manner for a modification of our findings and order as to any specific intrastate rates or charges on the ground that they are not related to the interstate rates and charges in such a way as to contravene the provisions of the interstate commerce act.

Schedules giving effect to these findings may be made effective on not less than five days' notice.

An order will be entered at this time giving effect to our findings with respect to the rates and charges of the carriers which have complied with section 2 of the Florida commissioners' order. The record will be held open for such further action as may become necessary.

Eastman, commissioner, dissents.

APPENDIX No. 1.—*Brick and rough stone.*

[Rates are stated in amounts per car, minimum 30,000 pounds.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
5 miles and under	$12.50	$9.25	240 miles and over 250	$32.00	$21.25
10 miles and over 5	14.00	7.81	250 miles and over 260	32.00	22.75
15 miles and over 10	16.50	13.62	260 miles and over 270	32.00	22.94
20 miles and over 15	16.50	15.62	270 miles and over 280	34.00	22.81
30 miles and over 20	17.50	17.50	280 miles and over 290	34.00	23.25
40 miles and over 30	18.50	18.13	290 miles and over 300	34.00	23.75
50 miles and over 40	19.50	18.50	300 miles and over 310	35.00	24.22
60 miles and over 50	20.50	19.62	310 miles and over 320	37.00	24.69
70 miles and over 60	20.50	20.50	320 miles and over 330	38.00	25.16
80 miles and over 70	21.50	21.62	330 miles and over 340	39.00	25.62
90 miles and over 80	22.50	22.50	340 miles and over 350	39.00	26.09
100 miles and over 90	23.50	23.50	350 miles and over 360	39.00	26.56
110 miles and over 100	24.50	24.62	360 miles and over 370	39.00	27.03
120 miles and over 110	25.50	25.50	370 miles and over 380	39.00	27.50
130 miles and over 120	26.50	26.50	380 miles and over 390	39.00	27.97
140 miles and over 130	28.50	26.50	390 miles and over 400	39.00	28.44
150 miles and over 140	27.50	26.50	400 miles and over 410	39.00	28.91
160 miles and over 150	29.50	27.50	410 miles and over 420	39.00	29.38
180 miles and over 170	29.50	27.50	420 miles and over 430	39.00	29.85
200 miles and over 190	30.50	29.50	430 miles and over 440	39.00	30.32
220 miles and over 210	30.50	29.50	440 miles and over 450	39.00	30.79
240 miles and over 230	31.50	29.50	450 miles and over 460	39.00	31.26
260 miles and over 250	32.50	30.50	460 miles and over 470	39.00	31.73

APPENDIX No. 2.—*Cement and plaster.*

[Rates are stated in amounts per ton.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
10 miles and under	$1.50	$1.18	210 miles and over 200	$3.25	$3.41
20 miles and over 10	1.625	1.41	220 miles and over 210	3.25	3.43
30 miles and over 20	1.875	1.65	230 miles and over 220	3.25	3.44
40 miles and over 30	2.00	1.88	240 miles and over 230	3.25	3.46
50 miles and over 40	2.125	2.03	250 miles and over 240	3.25	3.47
60 miles and over 50	2.25	2.19	260 miles and over 250	3.25	3.49
70 miles and over 60	2.375	2.35	270 miles and over 260	3.25	3.50
80 miles and over 70	2.50	2.50	280 miles and over 270	3.375	3.52
90 miles and over 80	2.625	2.66	290 miles and over 280	3.375	3.53
100 miles and over 90	2.75	2.74	300 miles and over 290	3.375	3.55
110 miles and over 100	2.75	2.82	310 miles and over 300	3.375	3.57
120 miles and over 110	2.875	2.90	320 miles and over 310	3.375	3.58
130 miles and over 120	2.875	2.97	330 miles and over 320	3.375	3.60
140 miles and over 130	3.00	3.05	340 miles and over 330	3.375	3.62
150 miles and over 140	3.00	3.13	350 miles and over 340	3.375	3.63
160 miles and over 150	3.125	3.21	360 miles and over 350	3.375	3.65
170 miles and over 160	3.125	3.28	370 miles and over 360	3.375	3.66
180 miles and over 170	3.25	3.37	380 miles and over 370	3.50	3.68
190 miles and over 180	3.25	3.38	390 miles and over 380	3.50	3.69
200 miles and over 190	3.25	3.40	400 miles and over 390	3.50	3.71

APPENDIX No. 3.—*Lime.*

[Rates are stated in amounts per ton.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
10 miles and under	$1.375	$1.18	210 miles and over 200	$3.125	$3.41
20 miles and over 10	1.50	1.41	220 miles and over 210	3.125	3.43
30 miles and over 20	1.75	1.65	230 miles and over 220	3.125	3.44
40 miles and over 30	1.875	1.88	240 miles and over 230	3.125	3.46
50 miles and over 40	2.00	2.03	250 miles and over 240	3.125	3.47
60 miles and over 50	2.125	2.19	260 miles and over 250	3.125	3.49
70 miles and over 60	2.25	2.35	270 miles and over 260	3.125	3.50
80 miles and over 70	2.375	2.50	280 miles and over 270	3.25	3.52
90 miles and over 80	2.50	2.66	290 miles and over 280	3.25	3.53
100 miles and over 90	2.625	2.74	300 miles and over 290	3.25	3.55
110 miles and over 100	2.625	2.82	310 miles and over 300	3.25	3.57
120 miles and over 110	2.75	2.90	320 miles and over 310	3.25	3.58
130 miles and over 120	2.75	2.97	330 miles and over 320	3.25	3.60
140 miles and over 130	2.875	3.05	340 miles and over 330	3.25	3.62
150 miles and over 140	2.875	3.13	350 miles and over 340	3.25	3.63
160 miles and over 150	3.00	3.21	360 miles and over 350	3.25	3.65
170 miles and over 160	3.00	3.28	370 miles and over 360	3.25	3.66
180 miles and over 170	3.125	3.37	380 miles and over 370	3.375	3.68
190 miles and over 180	3.125	3.38	390 miles and over 380	3.375	3.69
200 miles and over 190	3.125	3.40	400 miles and over 390	3.375	3.71

APPENDIX No. 4.—*Sand.*

[Rates are stated in amounts per car; minimum, 36,000 pounds.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
5 miles and under	$9.40	$6.25	240 miles and over 220	$28.00	$29.69
10 miles and over 5	10.50	7.81	260 miles and over 240	29.00	30.47
20 miles and over 10	13.00	10.62	280 miles and over 260	29.50	31.25
30 miles and over 20	14.00	11.50	290 miles and over 280	30.00	32.08
40 miles and over 30	15.00	13.13	300 miles and over 290	30.50	32.34
50 miles and over 40	16.50	14.38	310 miles and over 300	30.50	32.81
60 miles and over 50	17.00	15.62	320 miles and over 310	31.50	33.28
70 miles and over 60	17.50	16.09	330 miles and over 320	31.50	33.75
80 miles and over 70	18.00	17.34	340 miles and over 330	32.00	34.22
90 miles and over 80	19.50	18.59	350 miles and over 340	32.50	34.69
100 miles and over 90	20.50	19.84	360 miles and over 350	32.50	35.16
110 miles and over 100	20.50	20.31	370 miles and over 360	33.00	35.63
120 miles and over 110	22.00	21.56	380 miles and over 370	33.00	36.09
130 miles and over 120	22.50	22.81	390 miles and over 380	34.00	36.56
140 miles and over 130	23.00	23.28	400 miles and over 390	34.50	37.03
150 miles and over 140	24.50	24.54	410 miles and over 400	34.50	37.50
160 miles and over 150	25.00	25.79	420 miles and over 410	35.00	37.97
180 miles and over 160	26.50	27.34	430 miles and over 420	35.00	38.44
200 miles and over 180	27.00	28.13	440 miles and over 430	36.50	38.91
220 miles and over 200	27.50	28.91	450 miles and over 440	36.50	39.38

APPENDIX No. 5.—*Gravel.*

[Rates are stated in amounts per car, minimum 30,000 pounds.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
5 miles and under	$8.75	$6.25	240 miles and over 220	$27.50	$29.69
10 miles and over 5	10.00	7.81	260 miles and over 240	28.00	30.47
20 miles and over 10	12.50	10.62	280 miles and over 260	29.00	31.25
30 miles and over 20	13.00	11.50	290 miles and over 280	29.50	32.03
40 miles and over 30	14.50	13.13	300 miles and over 290	29.50	32.34
50 miles and over 40	15.00	14.38	310 miles and over 300	30.50	32.81
60 miles and over 50	16.50	15.62	320 miles and over 310	30.50	33.28
70 miles and over 60	17.00	16.09	330 miles and over 320	30.50	33.75
80 miles and over 70	17.50	17.34	340 miles and over 330	31.50	34.22
90 miles and over 80	19.00	18.59	350 miles and over 340	31.50	34.69
100 miles and over 90	19.50	19.84	360 miles and over 350	32.00	35.16
110 miles and over 100	20.00	20.31	370 miles and over 360	32.50	35.63
120 miles and over 110	21.50	21.56	380 miles and over 370	32.50	36.09
130 miles and over 120	22.00	22.81	390 miles and over 380	33.00	36.56
140 miles and over 130	22.50	23.28	400 miles and over 390	33.00	37.03
150 miles and over 140	23.00	24.54	410 miles and over 400	34.00	37.50
160 miles and over 150	24.50	25.79	420 miles and over 410	34.00	37.97
180 miles and over 160	25.50	27.34	430 miles and over 420	34.50	38.44
200 miles and over 180	26.50	28.13	440 miles and over 430	35.00	38.91
220 miles and over 200	26.50	28.91	450 miles and over 440	35.00	39.38

APPENDIX No. 6.—*Gasoline and other refined oils.*

[Rates are stated in cents per 100 pounds.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
	Cents.	*Cents.*		*Cents.*	*Cents.*
10 miles and under	22	21	210 miles and over 200	57	65
20 miles and over 10	24.5	24	220 miles and over 210	59.5	68
30 miles and over 20	28	28	230 miles and over 220	60.5	69
40 miles and over 30	29.5	30	240 miles and over 230	62	71
50 miles and over 40	30.5	32	250 miles and over 240	63	72
60 miles and over 50	34.5	37	260 miles and over 250	64.5	74
70 miles and over 60	35.5	38	270 miles and over 260	65.5	75
80 miles and over 70	37	40	280 miles and over 270	67	77
90 miles and over 80	38	41	290 miles and over 280	69.5	80
100 miles and over 90	40.5	44	300 miles and over 290	70.5	82
110 miles and over 100	43	47	310 miles and over 300	72	83
120 miles and over 110	44	49	320 miles and over 310	73	85
130 miles and over 120	45.5	50	330 miles and over 320	74.5	87
140 miles and over 130	47	52	340 miles and over 330	74.5	87
150 miles and over 140	49.5	55	350 miles and over 340	75.5	88
160 miles and over 150	50.5	57	360 miles and over 350	75.5	88
170 miles and over 160	52	58	370 miles and over 360	75.5	88
180 miles and over 170	53	60	380 miles and over 370	77	90
190 miles and over 180	54.5	62	390 miles and over 380	77	90
200 miles and over 190	55.5	63	400 miles and over 390	77	90

APPENDIX No. 7.—*Cotton.*

[Rates are stated in cents per 100 pounds.]

Distances.	Under section 1.	Under section 2.	Distances.	Under section 1.	Under section 2.
	Cents.	*Cents.*		*Cents.*	*Cents.*
10 miles and under	32.5	18	200 miles and over 180	65	58
20 miles and over 10	35	21	220 miles and over 200	66.5	60
30 miles and over 20	37.5	24	240 miles and over 220	67.5	62
40 miles and over 30	40	27	260 miles and over 240	69	63
50 miles and over 40	42.5	30	280 miles and over 260	70	65
60 miles and over 50	45	33	300 miles and over 280	71.5	66
70 miles and over 60	47.5	37	320 miles and over 300	72.5	68
80 miles and over 70	50	40	340 miles and over 320	74	69
90 miles and over 80	52.5	43	360 miles and over 340	75	71
100 miles and over 90	55	46	380 miles and over 360	76.5	72
110 miles and over 100	56.5	47	400 miles and over 380	77.5	74
120 miles and over 110	57.5	49	420 miles and over 400	79	75
130 miles and over 120	59	50	440 miles and over 420	80	77
140 miles and over 130	60	52	460 miles and over 440	81.5	78
150 miles and over 140	61	53	480 miles and over 460	82.5	80
160 miles and over 150	62.5	55	500 miles and over 480	84	82
180 miles and over 160	64	57			

ORDER.

[At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of March, A. D. 1921. No. 11861. Florida Rates, Fares, and Charges.]

In the matter of intrastate rates, fares, and charges of the Atlantic Coast Line Railroad Co. and other carriers in the State of Florida.

This case being a case instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the following-named common carriers by steam railroad, parties to this proceeding, namely, Apalachicola Northern Railroad Co.; Birmingham, Columbus & St. Andrews Railroad Co., and A. D. Campbell, receiver;

Charlotte Harbor & Northern Railway Co.; Fellsmere Railroad; Florida East Coast Railway Co.; Gulf Coast Railway; Live Oak, Perry & Gulf Railroad Co.; Ocklawaha Valley Railroad Co., and H. S. Cummings, receiver; Ocala & Southwestern Railroad Co.; Tavares & Gulf Railroad; Georgia & Florida Railway and W. R. Sullivan, John F. Lewis, and L. M. Williams, receivers; and South Georgia Railway Co., according as they respectively participated in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate charges for freight service, and to establish, put in force, and maintain charges for freight services in intrastate commerce within the State of Florida which shall exceed the charges for freight services of said carriers, including the minimum carload charge, the minimum less-than-carload charge, and the minimum class-rate scale, in effect July 29, 1920, and applicable to such transportation, in amounts corresponding to the increases heretofore made by said carriers under Ex parte 74 and now in effect in said carriers' charges for freight services in interstate commerce within the State of Florida and between points in the State of Florida and points in other States.

It is further ordered, That this order shall become effective on or before April 25, 1921, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until further order of the commission.

And it is further ordered, That a copy of this order be served upon each of the common carriers by steam railroad who are parties to said proceeding.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary*.

Mr. BURR. I think you indicated, Mr. Chairman, that so far as this was concerned, I had gone far enough.

The CHAIRMAN. I would be glad to have you put that into the record, but your statement is positive upon the proposition that the Interstate Commerce Commission did not attempt to inquire into actual discrimination, but evidently proceeded in your case upon the theory that your State rates must be the same as interstate rates.

Mr. BURR. Absolutely.

The CHAIRMAN. And your complaint is, of course, of the Interstate Commerce Commission, that it did not inquire into the fact of discrimination, but I assume that if your rates were not exactly according to the rates established for interstate traffic, that there must be discrimination.

Mr. BURR. Yes, sir. In other words, it appears to me that the Interstate Commerce Commission has been looking at this case, and perhaps some of the other cases, and finding discrimination where there is a mere difference in rates, rather than rates that created a discrimination and a burden upon interstate commerce. I think it must be conceded that it is often necessary that there be some difference in rates, and there can be a difference in rates within the State and yet there be no discrimination.

The CHAIRMAN. To me that is perfectly obvious. You do not have to continue any argument to prove that to me.

Mr. BENTON. Mr. Chairman, Judge Burr requests that I read a resolution adopted by the convention at Atlanta, which was put into the record at the beginning without reading. It is a resolution entitled "Resolution relating to certificates of convenience and necessity." [Reading:]

Whereas, by the transportation act of 1920 the Interstate Commerce Commission was, in terms, given exclusive authority to grant certificates of convenience and necessity for construction and abandonment, not only of railroad lines which are interstate in character but of railroad lines lying, or to be constructed, wholly within one State; and

Whereas the Federal Government ought not to undertake to authorize State railroads engaged in intrastate transportation, which have often been constructed, in part, by public aid from the State or subdivisions thereof, to abandon intrastate operation without authority from the State: Therefore be it

Resolved, That Congress be respectfully urged to amend the existing law so that certificates of convenience and necessity granted by the Interstate Com-

merce Commission shall not purport to relieve the carriers obtaining the same from conforming to the laws of the States with respect to construction and operation within the States for intrastate transportation, or with respect to the abandonment of such transportation.

I have not yet covered in my opening statement that resolution, but Judge Burr desires to speak to it.

Mr. BURR. About the middle of December, 1920, the Atlanta & St. Andrews Bay Railroad, a line of railroad running from Dothan, Ala., just above the Florida line, down through Florida to St. Andrews Bay, that is, to Panama City and the town of St. Andrews, on St. Andrews Bay, a distance of some 84 miles, made application to the Interstate Commerce Commission for permission to abandon their branch line from Panama City to St. Andrews, St. Andrews being served by a branch line at the end of the road from Panama City. It is a short distance. The actual trackage on the branch is only 2.64 miles in length. It is about 3 miles to the town, but from where the branch moves off out of the yard it is 2.64 miles.

Early in this year, 1921, the Interstate Commerce Commission, by Commissioner Meyer, wrote our commission under the cooperative provisions in the transportation act, and asked if we would not hear that case for them and make a report and recommendation to the Interstate Commerce Commission, and we finally agreed to do so. We felt that the first application that was made to us to cooperate ought to be complied with if possible. So we held the hearing for the Interstate Commerce Commission in March, somewhere near the middle of March.

The CHAIRMAN. That is of the present year?

Mr. BURR. Yes, sir. It took three days to take the testimony that was put in in that case, three long, solid days, too. We took as much testimony as if it had been a road a thousand miles long. That was taken without expense to the Interstate Commerce Commission, except that they furnished the shorthand reporter to take down the evidence. The commission was there at their own expense, and everybody else that appeared there; if there was any witness whose transportation had to be paid, we paid it. And I had some correspondence with the Interstate Commerce Commission as to whether they expected our commission to make up a regular tentative report to the Interstate Commerce Commission such as an examiner makes for them, or whether we should just write a communication saying that we approved this abandonment or disapproved it and send the record. Of course, we had to send the record to them, and did send the record to them.

Our time was too much consumed with other matters at the time to go into the question of writing a tentative report in that case, so we resorted to the other means of simply a short communication to the Interstate Commerce Commission transmitting the testimony and the exhibits in the whole case, and returning their docket to them, and recommended against the abandonment.

St. Andrews is a town of 1,300 people who have settled there in good faith and built homes, and their business men have established businesses that would not have been established there had the railroad not reached there, and some of those businesses are such that they must sustain large loss if the railroad is moved away, because they can not move all of the investment that they have got.

Senator POINDEXTER. What is the distance from Panama City to St. Andrews?

Mr. BURR. It is a 3 miles haul. Of course, their business can be trucked back and forth, but it would be at a greater expense to some of the industries there that were served by the railroad. And as I say, there is an investment there in plant facilities, so even if they do haul to Panama City it will be at a loss, and they can not move to Panama City without throwing away that investment and having to procure other properties and facilities and make further investments.

Senator POINDEXTER. That is in a way like a switch, almost?

Mr. BURR. Why, yes. The former owners of this road called this branch line the Terminal & Switching Co. Now, the branch was operated by the same crews that operated the main-line trains. This railroad is only 84 miles long, the whole of it. Of course, you realize that it is a very short run. And it would take very little time to make the run from one end of the line to the other, and there was only occasional overtime for the crews that operated these trains in and out of there, due sometimes to the lateness of the arrival of their train from the northern end of the road. There would be some little overtime, but usually there was no overtime.

Now, I find fault with the Interstate Commerce Commission in this: First, we recommended that the road be denied the privilege of taking up that track for the reason that it would injure a great number of people that had all their money invested in this town. There is one fishery company there that has a plant investment of over $100,000. This plant can not be moved to Panama City. They are compelled to buy trucks now with the abandonment of the railroad, whereas it was not necessary for them to have trucks before, because the cars of the railroad run right to their door. These people have a fishing business there, and all of this fish goes out to the markets all over this country. Now, this party who owned this plant had built an icing plant in connection with his fish houses, for cold storage, etc. He put his fish in cold storage until they were shipped out, and he had this railroad right at the door, making it convenient to ship his fish out. With the removal of the railroad he is left with that investment on his hands, and it is a considerable investment and he can not move it somewhere else. He has got to stay and have his plant there. His fishing fleet, of course, can go into Panama City or any place on St. Andrews Bay; the fishing fleet can get any place on St. Andrews Bay as easily as they can get to St. Andrews, but they would not have a fish house to deliver the goods to.

Now, in making the order they permitted the temporary abandonment of that line for 90 days. That is the ridiculous part of it, to my mind. What can be proven by the abandonment of the St. Andrews branch for 90 days is something that I can not understand. They will have nothing to compare the situation with, and it looks to me that if it was going to be abandoned at all, in justice to the people who have their money invested there, it ought to be abandoned permanently so that they would know what they are going to expect and what they should do. It is equivalent to ordering these people to cease doing business for 90 days.

The CHAIRMAN. Was this company organized under the laws of Florida?

Mr. BURR. Yes.

The CHAIRMAN. Not under the laws of Georgia?

Mr. BURR. No, sir; not under the laws of Georgia. They are chartered under the laws of Florida.

The evidence shows that there are three of these wholesale fish concerns. Fish is one of the biggest industries at this point. The report of the Interstate Commerce Commission finds that there are only two fisheries there. One of the things that I am objecting to is the position they have put my commission in. We took this evidence and took it in good faith, and their report does not reflect what is actually in that record. They found that during the period that was under review there were only 12 cars of fish moved from the town of St. Andrews. The railroad company's answer to the questionnaire which was sent to them to be answered, by the Interstate Commerce Commission, sworn to by the vice president of that road, shows the initials and car numbers for 103 carloads by express.

Senator TOWNSEND. During what time?

Mr. BURR. That was from the period January 1, 1920, to January, 1921. The railroad company's answer to the questionnaire, as I say, which was sent to them by the Interstate Commerce Commission, shows 103 carloads by express shipments and 12 carloads by freight. And you will observe that their report says that there were only 12 carloads of fish shipped from that point during those 12 months, ignoring altogether that there were 103 cars more shipped, making a total of 115 cars.

The CHAIRMAN. Of course, evidence that the Interstate Commerce Commission may have made a mistake in one case would not be reviewable here, but the question is whether we should give the power to the Interstate Commerce Commission to do this thing. What is your view of it? That we ought to give it to no one, or that we should give it jointly to the Interstate Commerce Commission and the State?

Mr. BURR. I believe this, that if a piece of railroad crossing a State line seeks to take up its tracks that it ought to be reviewed by the Interstate Commerce Commission, but I believe that if that piece of trackage is wholly within the State, that the State authorities are more competent to go into the question, for they will know the conditions better than the Interstate Commerce Commission can ever know them, and they ought to be allowed to pass upon that.

The CHAIRMAN. That power would be futile. A great many of the railroads pass through more than one State. Now that is true of this railroad. And I

think any one would have to treat the railroad as a whole. It may not be wise to give any tribunal the right to say that a track or a part of a track should be abandoned, but if we give to any tribunal the right to determine that question, it would seem to me that it would have to be in the Interstate Commerce Commission.

Mr. BURR. Well, I do not know that I made my answer clear, Senator.

The CHAIRMAN. Well, this little branch of 3 miles was owned and operated by an interstate carrier, and laws have to be general; you can not make them specific, to meet a particular case. Now, where ought the power to be? The fact that it was a branch line would cut no figure. It might be just as well a part of the main track.

Mr. BURR. Well, the way I look at it is this, sir: Every railroad that is in the business of common carriage is an interstate carrier, as far as that is concerned.

The CHAIRMAN. I do not know of any that is not.

Mr. BURR. But what I mean by crossing the State line is this: I do not mean a part of the system that crossed the State line, but I mean the track to be abandoned would be track that would cross the State line; the actual track sought to be taken up would be a piece of track that crossed the State line. I say that there the Interstate Commerce Commission ought to pass on whether that is needed or useful in the interstate transportation. But if the track is not so located but is wholly within the State, then I say that the State commission, where there is a State commission, or whatever State authority is created for such purposes, ought to poss upon it.

Our Supreme Court has intimated in another abandonment case that they think that the only power that can give the right to a carrier to dismantle and go out of business is the power that gave it right to do business in the State, and that is the legislature.

The CHAIRMAN. Of course, I can understand that position. It may be that we can not give to the Interstate Commerce Commission properly the right to say that any railroad, no matter whether it is State or interstate, can quit business and take up its tracks.

Mr. BURR. One of the points that I want to make about this thing is that the Interstate Commerce Commission have too much to do to know whether a piece of road 3 miles long or 50 miles long in my State ought or ought not to be taken up. Oftentimes a question is intrusted to people that have had no experience in affairs at all, and they do not get the grasp of the situation or the necessity for these things, and it is shown—it seems to me clearly here. I have not the slightest idea that the Interstate Commerce Commission read the exhibits or the testimony in that case before the order was issued. They certainly would not have left out of 115 carloads of fish 103 carloads of fish if they had read the testimony in this case. I believe that is really all the work of some clerk.

Now, I feel like cooperating with the Interstate Commerce Commission, but I do not like to use the services of my commission and have it turned down by some inexperienced clerk in the Interstate Commerce Commission's office. Now, I do not mean to say that because we did not agree upon the first case of cooperation that we had that we ought not to cooperate at all.

The CHAIRMAN. We will have to suspend at this point.

Mr. BURR. Can I have just one minute more, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. BURR. I want to say that the revenue as shown by the figures of the railroad witnesses in this abandonment case are as follows: The gross average revenue per mile for that branch line amounted to $7,078.61. The average revenue per mile for the entire line of 84.64 miles was $5,183.38, so there could not have been much necessity for the abandonment of the branch line.

The CHAIRMAN. How do you figure that—on a mileage basis or otherwise?

Mr. BURR. Yes; on the mileage basis they allowed these revenues.

The CHAIRMAN. We will suspend now, and I hope the members of the committee will be able to get together at 2 o'clock and go on with this hearing at the other office. We will now take a recess until 2 o'clock, to meet at the other office.

(Thereupon, at 11 o'clock a. m., Friday, October 28, 1921, a recess was taken until 2 o'clock p. m. of the same day.)

AFTER RECESS.

The committee resumed at 2 o'clock p. m. pursuant to recess.

The CHAIRMAN. The committee will resume the hearings. Mr. Shaughnessy, you will state your full name, whom you represent, and your relation to this inquiry.

STATEMENT OF HON. JOHN F. SHAUGHNESSY, CHAIRMAN NEVADA PUBLIC SERVICE COMMISSION AND MEMBER OF THE INTERMEDIATE RATE ASSOCIATION.

Mr. SHAUGHNESSY. I am chairman of the Nevada Public Service Commission. I am also a member of the Intermediate Rate Association. That is an organization comprising the intermountain State commissions, the traffic bureaus, chambers of commerce, and commercial clubs. I appear here as the representative of these organizations.

Mr. Chairman and gentlemen of the committee, supplementing the statements made here by other States, I desire to review the Nevada-Shreveport situation, and I can perhaps best bring to your attention what the issues are and how the carriers in our territory approached the matter by reading a few excerpts from the record of testimony put in before the Nevada commission upon the application of the carriers for the same percentage of increase as that granted in Ex parte 74.

That application was filed with the Nevada commission on May 24, 1920, and supplemented on July 27, 1920, by the carriers serving Nevada, in asking for that same percentage of increase, whatever it would be when the order was issued, which was on July 29, 1920.

In opening the hearing before the Nevada commission on the carriers' application, which hearing took place on August 16–17, 1920, Mr. Henley C. Booth, commerce attorney of the Southern Pacific Co., and appearing as counsel for all the carriers serving Nevada, made the following statement, this being his opening statement:

"I should like to offer in evidence, as the only evidence we intend to offer in this matter, the certified copy of the opinion of the Interstate Commerce Commission in Ex parte 74, and I offer in connection with that a certified copy of Released Rate Order No. 149 of the Interstate Commerce Commission and a certified copy of Special Permission No. 50340, both of which are to be taken in connection with the order of the commission in Ex parte 74."

Following that I asked him this question:

"In offering your testimony the only exhibit you offered was that of the commission's decision in docket Ex parte 74. Do you wish to have considered in evidence the record taken before the Interstate Commerce Commission in Ex parte 74?"

To my question Mr. Booth replied:

"That question was asked of me by the chairman of the California commission, and I made substantially this reply. After considering the matter we came to the conclusion that the order of the Interstate Commerce Commission is in the nature of an adjudication and that the situation was to be compared to an attorney seeking to prove a judgment; he offers the judgment in evidence, proves its authenticity, and stops there; he does not offer the transcript of the reporter's notes upon which that judgment was based. Perhaps a better comparison would be a citation of a case to the supreme court of this State. We will say a California decision. It is very often done among attorneys that when such a decision is cited that the attorney goes to the law library and looks at the transcript and briefs in the case and uses those in his argument as illustrative and helpful in the consideration of the case, and yet the case is the authority he stands on and not the transcript of testimony taken before the court."

The CHAIRMAN. That is, in substance, he offered the order.

Mr. SHAUGHNESSY. That is all.

The CHAIRMAN. And not the testimony?

Mr. SHAUGHNESSY. Not the testimony. Mr. Booth, continuing, said:

"We do not understand that this case should degenerate into a rate case. The situation is one of exigency and emergency, and it has never been our thought that we would ever produce any evidence in opposition to what any shipper might say or take part in any investigation of that character."

I then asked him this question:

"Is it your thought, notwithstanding that the rates within Nevada might be found to be compensatory, that that shall be given no weight or consideration in the application of these so-called horizontal increases ordered by the Interstate Commerce Commission for the Mountain-Pacific group as a whole?"

And Mr. Booth replied:

"Our thought is that this is a revenue case and not a rate case, and that if the construction is to be placed upon the transportation act which we believe should be placed upon it, the only function of this proceeding is to determine whether the commission will or will not enter an order in conformity with the percentages of increase prescribed by the Interstate Commerce Commission. We regard the question of adjustments as one which should be taken up, if at all, after that step is taken and, as I suggested yesterday, we feel that even in the matter of adjustments there are some limitations on the powers of the State commissions. That is, the adjustments should make no material interference with the national plan of regulation."

That, in substance, was the position of all the carriers appearing before the Nevada commission at that time, planting themselves squarely on the ground that the case was a revenue one and in no sense of the word a rate case.

A number of witnesses from various sections of the State of Nevada appeared and put in testimony, but Mr. Booth, on behalf of the carriers, gave notice that he would not cross-examine any of those witnesses or have anything to do with the testimony as it went in; nor did he have any connection with the evidence so put in.

The Nevada commission, proceeding from that point and exercising its delegation of power from the legislature, could find no authority anywhere by which it might, if we thought the rates should go in without modification or adjustment—could find no authority anywhere by which we could take any such action as that. And therefore in our opinion we reviewed the issues and rejected the application of the carriers.

From that point an appeal was taken to the Interstate Commerce Commission, if we may refer to it as an appeal, on the ground that the action of the Nevada commission was unjust and uncalled for; that the rates which we refused to increase in the same percentage as those increased in Ex parte 74 were discriminatory.

The CHAIRMAN. Technically it was not an appeal.

Mr. SHAUGHNESSY. No.

The CHAIRMAN. It was an original application, I take it, which was made to the Interstate Commerce Commission thereafter.

Mr. SHAUGHNESSY. Yes; I should have corrected that statement. It was on that ground an original application to the Interstate Commerce Commission. In due time an examiner appeared and was prepared to take testimony on the issues. The examiner was instructed, and the parties also—the State of Nevada and Attorney Booth—that the commission would take evidence on the reasonableness of the rates in the State of Nevada as affecting either intrastate or interstate commerce. That is, in so far as the evidence went to the question of discrimination.

There is a colloquy that might be somewhat interesting with respect to the interpretation which the carriers placed upon that matter, and with your permission I will refer to it.

The CHAIRMAN. Before you turn to that, Mr. Shaughnessy, did this examiner who appeared for the Interstate Commerce Commission take any evidence with regard to discrimination?

Mr. SHAUGHNESSY. Oh, yes; he took evidence in detail.

The CHAIRMAN. As to whether it was or was no discrimination?

Mr. SHAUGHNESSY. Yes; he did that. But, of course, we have not been able to bring ourselves to believe, while he might have found discrimination here or there, that he did so upon any basis of reasonableness; and it was our thought, the thought of our people out there, that the two must necessarily be considered together, must be dealt with together, or we can not for the future go forward with any certainty. What I mean by that is that there was traffic within the State of Nevada that was bearing all it could bear in the way of rates. But not withstanding that fact discrimination was found and the carriers ordered to remove the discrimination, which they removed by increasing the rates to a level of Ex parte 74.

In Ex parte 74 it was provided, as you probably recall, that the carriers and the Interstate Commerce Commission would probably find many rates that would

not justify themselves; that there were many cases that should be adjusted promptly, and the shippers of the country were requested to call upon the respective carriers to adjust such rate situations promptly without bringing the matter to the Interstate Commerce Commission.

The CHAIRMAN. The way I understand the law, and it does not seem to me to have been applied in any case I know of up to this time, is that when the carriers applied to the Interstate Commerce Commission they would have to apply to that commission on the ground that the Nevada rates were discriminatory; that is, discriminated against persons or localities or interstate commerce. If the commission found that your rates, or any of them, did so discriminate against interstate commerce the law simply transfers the rate-making power on that particular commodity, whatever it may have been, to the Interstate Commerce Commission, and then it would be for the Interstate Commerce Commission to determine whether the rate was a reasonable one or not as it determined the question of interstate rates. I have not read the decision in the Nevada case, the decision of the Interstate Commerce Commission, but that is the way I understand the law.

Mr. BENTON. For the purpose of the record, if it may be done, I would like to have the inquiry presented to Mr. Shaughnessy whether there was any evidence whatever in that case of discrimination injurious to particular persons or localities.

The CHAIRMAN. You may answer that; whether there was evidence to show that the rates were unduly disadvantageous.

Mr. BENTON. Whether there was any evidence whatever of discrimination, and if so, the extent of it.

Mr. SHAUGHNESSY. Well, there was a so-called discrimination as between the level of the two rates.

The CHAIRMAN. That is not discrimination.

Mr. SHAUGHNESSY. No; that is what we contended that it was not what might be termed undue discrimination, because there were many factors entering into any number, in fact a great majority of interstate rates, that do not apply to intrastate rates.

The CHAIRMAN. The mere fact that the rates were not the same per mile, or on any other basis with interstate rates along that line, does not prove discrimination in and of itself. What I would like to know is whether the Interstate Commerce Commission entered into an investigation of the manner in which, if at all, the State rates affected interstate commerce or the rates which the people who lived outside the State must pay in order to do business within the State.

Mr. SHAUGHNESSY. No; they did not, Senator. It might be termed a series of hypothetical cases.

The CHAIRMAN. Or in other words, did they undertake to do in Nevada what the shippers outside the State of Texas did in the Shreveport case—to show that they were kept out of Texas by discriminating rates or lower rates in the State of Texas?

Mr. SHAUGHNESSY. The carriers contended that that would be one of the effects, but they did not show in any particular case, not in one single case, that there was such a burden or restriction on interstate commerce. And you will find in reading the opinion in the Nevada case that they make these rate comparisons all right enough, and then go on and say that there are a number of cases shown where the shippers might take advantage of shipping in to some Nevada point and unload and rebill and reship out again in order to gain advantage of the difference between the two rates. But as to any actual burden or restriction upon interstate commerce they failed to show anything of that kind. And when it came to the reasonableness of the rates which the Interstate Commerce Commission had called upon the carriers to put into the record, counsel for the carriers refused flatly—absolutely failed and refused to put in evidence on that part of it.

The CHAIRMAN. That was before your commission?

Mr. SHAUGHNESSY. No; this was before the Interstate Commerce Commission. And the Interstate Commerce Commission, finding that no record had been put in in the Nevada case, I assume, issued the order to investigate the reasonableness of the rate; or that would be the theory underlying it. In that connection, of course, this procedure was bad, for the reason that it would, in effect, make an original proceeding out of it; that upon complaint from the carriers that the Nevada rates were discriminatory, the Federal commission, without evidence other than a difference in level of rates, found that the intrastate rates

should be increased in the same percentages as those provided for interstate rates in Ex parte 74. This action gave the State commission no opportunity whatever to pass upon the rates under its jurisdiction, unless it did so without evidence, which it is not empowered to do under the laws of Nevada.

We argued strenuously that there was no authority in law by which the Interstate Commerce Commission could assume such jurisdiction over every State rate within our jurisdiction, and in this connection we objected along the following lines:

FORMAL OBJECTIONS OF PUBLIC SERVICE COMMISSION OF NEVADA.

[Before the Interstate Commerce Commission. I. C. C. Docket No. 11914. Involving rates, fares, and charges of the Southern Pacific Co. et al. operating within the State of Nevada. Hearing at Reno, Nev., Dec. 6, 1920.]

We object to the granting of the prayer of the carriers in this proceeding, to wit: "That an order be entered * * * prescribing rates and fares for the transportation of freight and passengers within the State of Nevada," on the ground that to do so is a suit against the State of Nevada without its consent (which consent is hereby formally denied), and therefore this honorable commission has no jurisdiction to in any way interfere with the domestic affairs of this State.

We further object on the ground that the carriers have failed and refused to make any showing before the Nevada commission by which it could be determined what is the reasonable valuation of the properties actually and beneficially devoted to the service within the State of Nevada.

We further object on the ground that such an order as prayed for by the carriers would be unlawful and unjust on the ground that said carriers have failed and refused to submit any testimony before the Nevada commission by which it could be determined whether or not the present rates and fares between points within the State of Nevada are excessive and unjust, or less than just, reasonable, and fairly compensatory, when measured by the reasonable valuation of the property actually and beneficially devoted to the service within Nevada.

We further object that the carriers have failed to state a true cause of action and are improperly before this honorable tribunal on the ground as aforesaid, that they have established no basis as to whether the rates within Nevada are less than just, reasonable, and compensatory, and without which they can not be heard to complain that Nevada's rates are unduly discriminatory against interstate rates which were horizontally increased in Ex parte 74, and which thus far have not been measured as to their reasonableness to the public. And in this behalf,

We further object on the ground that there is nothing in the Esch-Cummins Act which authorizes the Federal commission to fix a high rate in one State in order that it may confer jurisdiction upon itself to say that rates in another State are too low and must therefore be raised to the same level on the ground that the carriers need the money and without regard to the reasonableness of the rates to the public.

We further object that under the aforesaid act this commission is without jurisdiction to do more than investigate and determine the reasonableness of the interstate freights and fares of railroads serving Nevada, and that until such determination is made and in the absence of a showing by the carriers before the Nevada commission that the present rates are unjust, unreasonable, and noncompensatory, the honorable Interstate Commerce Commission has no power to in any manner interfere with the intrastate rates within Nevada. This is true for the reason that otherwise under the issues raised in the pleadings and the failure of the carriers to submit evidence before the Nevada commission, this proceeding will be the full equivalent of an original proceeding by the Interstate Commerce Commission to determine and fix the reasonableness of both the interstate and intrastate fares at one and the same time, a power which this honorable commission does not possess. In this behalf the jurisdiction of the Federal commission is clearly restricted from proceeding as aforesaid by paragraph 2 of section 1 of the Interstate Commerce Commission act, wherein it is provided that—

"The provisions of this act shall not apply to passengers or property or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

Further, the same section (1) limits the jurisdiction of the Interstate Commerce Commission to the regulation and control of interstate commerce and no other, and this grant of authority reads as follows:

"The provisions of this act shall apply to the transportation of passengers or property * * * from one State or Territory of the United States or District of Columbia, to any other State or Territory or the District of Columbia, or from one place in a Territory to another place in the same Territory, but shall not apply to the transportation of passengers or property, etc., wholly within one State. * * *"

We further object that if carriers' application in this proceeding is granted and receives the approval of the United States Supreme Court, it means the beginning of the end of State authority and the effective exercise of our dual form of government; in other words the ultimate destruction of the people's right to local self-government and in lieu thereof the centralization of all important functions of local government in the hands of bureaucratic departments at Washington.

We further object that, if the carriers' prayer is granted and ultimately receives the approval of the United States Supreme Court, the immediate effect will be to take from our legislators, courts, commissions, and the direct vote of the people upon the initiative, all power which they have heretofore exercised, over State commerce, and its instrumentalities. The question at issue is one of government upon which there can be no compromise and if present constitutional provisions are susceptible of the construction contended for under the Esch-Cummins Act, the time is at hand for immediate appeal to Congress, and, if necessary, to the people for the submission and passage of a further constitutional amendment in such form as will, for all time, save to the people their rights, liberties and local independence.

We further object upon the ground that the Interstate Commerce Commission determined aggregate value of railroad property fixed under Ex parte 74, section 15-A, is unjust, unreasonable, and excessive as a basis upon which to measure the reasonableness of rates to be literally applied to traffic moving to and from and within Nevada. Further that the interstate rates fixed thereon will dry up certain lines of industry and in other cases will cause a diminution in development and cast an unjust and excessive burden upon Nevada's producers, travelers, and consumers.

PUBLIC SERVICE COMMISSION OF NEVADA,
J. F. SHAUGHNESSY, *Chairman.*

The commission disposed of our contentions at page 637, in the Nevada Advance Rate Case (60 I. C. C. reports), wherein the commission said that "In answer to a somewhat similar contention in Arkansas Rates and Fares (59 I. C. C., 471), we held:

"The desirability of concerted action of the State and Federal regulatory bodies in all matters of transportation in which the power of both is involved has been given recognition in the interstate commerce act. The action of respondents in bringing the matter before us in advance of the filing of an application with the corporation commission and a determination by it renders difficult the coordinated action contemplated by Congress and deprives us of the benefit of such investigation and findings as the State authorities might have made. However, we are here confronted with practical questions for the solution of which Congress has provided a practical course of procedure by means of which substantial justice is assured. Respondents have elected to pursue that course and we are not vested with appellate power under which they might be remanded to tribunals of the State."

That is the vice as we see it of the working of the transportation act as construed by the Interstate Commerce Commission and the carriers. The carriers contended entirely along those lines—that if the State commission acts all well and good, no matter what the statements made may be or no matter what the proof may be. Otherwise. upon appeal to the Interstate Commerce Commission, it may assume the equivalent of original jurisdiction and go forward upon such basis.

The CHAIRMAN. I think the act gives to the Interstate Commerce Commission original jurisdiction. We put into the act a clause which gives the carriers, for the first time, I think, the right to complain of a discriminatory State rate;

and I think the carrier under the law would have the right to go directly, if it does exercise it, to the Interstate Commerce Commission and say that your rate on a certain commodity is unduly discriminatory against interstate commerce upon that commodity. Then I think comes the cooperation which the act provides for between the Interstate Commerce Commission and the State commissions. If the Interstate Commerce Commission finds upon testimony that that rate does unjustly and unduly affect shippers or dealers or producers outside the State, if that is its finding, why, then we gave it the power to say what that rate shall be; in other words, to remove the discrimination. When it comes to the exercise of that part of its power it is governed necessarily by the same rule, precisely, that we have laid down for interstate rate; that is, it must enter into an inquiry as to the reasonableness of the rates. At least I see no escape from that conclusion. But the first thing that it has got to do is to find that the rate is one which is made unlawful by the statute, namely, an unjustly discriminatory rate as against persons, localities, or interstate commerce.

Mr. SHAUGHNESSY. Following out that theory, it would be difficult to find many rates that will be left in any particular State subject to the jurisdiction of the State commission.

The CHAIRMAN. I do not agree with you. You are thinking of just one thing, namely, the difference in the level of rates.

Mr. SHAUGHNESSY. Yes, but jurisdiction over every rate in Navada was taken by the Interstate Commerce Commission.

The CHAIRMAN. That fact does not establish discrimination at all. You may have a level of rates in a State on commodities and where business is done that may be lower or higher than rates outside upon the same commodity or business without disturbing in the least the competition between the people who enter into the business. Suppose in my own State we had a rate on potatoes from a place 30 miles out of Des Moines into Des Moines. No matter what that rate was no human being could say that it affected interstate commerce; would affect the shipment of potatoes anywhere. That is my idea about it. What I am anxious to find out is whether or on what kind of evidence the Interstate Commerce Commission found that your rates discriminated against interstate commerce.

Mr. SHAUGHNESSY. There was no evidence except the difference in the levels, Senator, and the possibility that discrimination might occur. But from the carrir's standpoint, with emphasis too, they insisted that those rates must be upon a uniform level in order to bring in the necessary revenue.

The CHAIRMAN. I have been led to believe from what has been introduced up to this time that the railroads have taken the position that the mere fact the rates were different is sufficient to prove discrimination.

Mr. SHAUGHNESSY. Yes; they have done that. That has been their position. That is the theory upon which the Interstate Commerce Commission rested its decision in this Nevada advance rate case started March 8, 1921. I will offer, if you desire, a copy for the record.

The CHAIRMAN. I am going to have all those orders secured.

Mr. SHAUGHNESSY. Do you want it put in the record?

The CHAIRMAN. I would like to have it in the recrod.

Mr. SHAUGHNESSY. I now offer it.

(The opinion is as follows:)

[3709. Interstate Commerce Commission. No. 11914. Nevada rates, fares, and charges.]

In the matter of Intrastate rates, fares, and charges of the Southern Pacific Co. and other carriers in the State of Nevada. Submitted February 1, 1921. Decided March 8, 1921.

Certain rates, fares, and charges required by State authority to be maintained by the respondents within the State of Nevada found to be lower than the corresponding interstate rates, fares, and charges authorized by Increased Rates, 1920 (58 I. C. C., 220) and to be unduly prejudicial to interstate passengers and shippers, unduly preferential of intrastate passengers and shippers, and unjustly discriminatory against interstate commerce.

L. B. Fowler, J. F. Shaughnessy, W. H. Simmons, James G. Scrugham, Benson Wright, and Fred W. Feldt for State of Nevada and Public Service Commission of Nevada.

Fred Wood, J. R. Bell, H. C. Booth, Fred E. Pettit, jr., and James S. Moore, jr., for respondents.

E. H. Walker, for Reno Chamber of Commerce, Reno Rotary Club, Greater Carson Club, Churchill County Commercial Club, and Fallon Commercial Club.

C. H. Stevens, for Verdi Lumber Co.; B. J. Henley, and H. M. Rives, for Nevada Mine Operators' Association; H. R. Cooke, for Round Mountain Mining Co., Fairview Extension Co., and Fairview Round Mountain Mines Co.; and S. W. Bedford, for Mason Valley Mines Co.

John E. Benton, for National Association of Railway and Utilities Commissioners.

REPORT OF THE COMMISSION.

HALL, commissioner: In Ex parte 74, Increased Rates, 1920 (58 I. C. C., 220) we authorized increases in rates, fares, and charges to be made by all steam railroads subject to our jurisdiction in the group which serves the State of Nevada. These increases within that group, designated by us as the mountain-Pacific group, were 25 per cent in freight rates; 20 per cent in passenger fares and charges, excess-baggage charges, and rates on milk and cream; and a surchage upon passengers in sleeping and parlor cars amounting to 50 per cent of the charge for space in such cars, to accrue to the rail carriers. Increased rates, fares, and charges pursuant thereto were established generally, effective on August 26, 1920.

Prior to our decision in Increased Rates, 1920 (*supra*) the steam railroads operating in the State of Nevada, except the Nevada Northern Railway Co., had applied to the public-service commission of that State, hereinafter referred to as the Nevada commission, for permission to make increases in their intrastate rates, fares, and charges similar to those which should be authorized by us on interstate traffic. After our decision the Nevada Northern peitioned the Nevada commission for permission to make the same increases in its intrastate rates, fares, and charges as had been authorized by us with the exception of intrastate rates on ores between points on what is known as its "Mines-Smelter" branch.

Hearing was held by the Nevada commission, and all of the evidence before us in Ex parte 74 was made part of the record before it. By report and order of September 17, 1920, the carriers' applications were denied. Thereafter certain carriers by steam railroad operat.ng in Nevada filed with us a petition in their own behalf, and on behalf of all steam railroads that might be made parties, for relief in accordance with the provisions of section 13 of the interstate commerce act. This proceeding, to which all railroads subject to our jurisdiction in the State of Nevada have been made parties respondent, was then instituted on our own motion. There are no electric roads operating in Nevada. The record in Ex parte 74 has been made part of the record in this case.

Nevada is the sixth largest State in the Union and the least populous. The following table gives comparable data, based on the 1920 census, as to most of the States included in whole or in part in the mountain-Pacific group:

State.	Area in square miles.	Population.	Population per square mile.	Population per mile of railroad.
Montana	146,997	547,593	3.71	110.55
Idaho	83,888	431,826	5.14	149.76
Wyoming	97,914	194,402	1.98	102.62
Colorado	103,948	930,376	8.95	157.49
New Mexico	122,634	360,247	2.93	117.03
Arizona	113,956	333,273	2.91	149.17
Utah	84,990	449,446	5.29	216.49
Nevada	110,690	77,407	.699	33.23
Washington	69,127	1,356,316	19.67	216.23
Oregon	96,699	783,285	8.10	252.54

I. PASSENGER FARES.

The following table shows the present intrastate and interstate bases of fares in Nevada:

Railroads.	Rate per passenger-mile.	
	Intrastate.	Interstate.
Southern Pacific—Main line	$0.04	$0.048
Western Pacific—Main line		
Nevada Northern	.045	.054
Southern Pacific—Nevada & California branch	.05	.06
Southern Pacific—Fernley branch		
Los Angeles & Salt Lake—Main line		
Virginia & Truckee		
Tonopah & Tidewater	.06	.072
Tonopah & Goldfield		
Los Angeles & Salt Lake—Branch lines		
Western Pacific—Reno branch		
Bullfrog Goldfield		
Nevada Copper Belt	.08	[1] .096
Nevada Central	.0968	[1] .115
Eureka Nevada, operated by the Nevada Transportation Co	.10	No fares.

[1] Joint interstate fares applying from points on these lines have not been increased.

Prior to August 26, 1920, the level of interstate and intrastate passenger fares in Nevada had generally been the same. Their history may be sketched in a brief and general way as follows:

Prior to July 1, 1906, the passenger-fare basis on the main line of the Southern Pacific was 5 cents; on the branch lines from Hazen to Churchill, 7 cents; Churchill to Mina, 6.5 cents; and Mina to the State line, 6 cents. On that date the main-line fares were reduced to a basis of 4 cents per mile, while all the branches were placed on a 5-cent basis. These bases continued in effect until August 26, 1920, when the interstate fares were increased 20 per cent.

In 1907 the Nevada commission instituted a proceeding looking toward reduction in the main-line fares of the trunk lines to 3 cents per mile. As a compromise the carriers established round-trip fares between Reno and San Francisco, Sacramento, and a few other points in northern California on a basis of 80 per cent of double the one-way fare, and also established round-trip fares in Nevada on a basis of 85 per cent of double the one-way fare.

On January 24, 1913, the Nevada commission entered an order reducing the main-line fares of the Southern Pacific to 3 cents per mile and the branch-line fares to 4 cents per mile. The United States district court enjoined this order without passing upon the reasonableness of the fares. It was subsequently withdrawn and the proceeding discontinued. In 1914 the Nevada commission instituted another proceeding relative to passenger fares in Nevada. Hearings were had and the case submitted. No decision has been rendered. Recently the Nevada commission cited the Southern Pacific, Western Pacific, and Los Angeles & Salt Lake to show cause why their intrastate fares should not be reduced to a "just and reasonable basis." At the hearing the chairman of the commission stated that he considered 3.6 cents per mile a just and reasonable basis.

The existing intrastate fares of the Los Angeles & Salt Lake and the Western Pacific, which are the same as the interstate fares in effect on August 25, 1920, were established on the opening of those lines in 1905 and 1910, respectively. Because of competition the Western Pacific established the fares then applying on the Southern Pacific.

The first passenger fares of the Tonopah & Goldfield were established in 1905 and were based on 10 cents per mile. On July 1, 1906, this basis was reduced to 8 cents, and on January 1, 1907, to 6 cents. The 6-cent basis in effect on the Tonopah & Tidewater and the Bullfrog Goldfield was established in 1907 and 1908, respectively.

Fares on the Nevada Central have been uniformly on a basis of 9.68 cents per mile; on the Nevada Copper Belt 8 cents, established in 1910; and on the Nevada Northern 4.5 cents, prescribed by the Nevada commission in 1912. This

road also publishes intrastate commutation fares between McGill, Ely, and other points for the benefit of employees of the Nevada Consolidated Copper Co. The basis of the Virginia & Truckee is about 5 cents, representing reductions made in 1911 and 1917.

It will be seen that for the most part the fares in effect on August 25, 1920, had been in effect for many years and had been established during a period of relatively low operating costs.

Prior to Federal control the carriers issued scrip books good for both interstate and intrastate transportation, one for $90 at the rate of 2.5 cents per mile and one for $40 at the rate of 3 cents per mile. Full fare was paid in purchase of these books, but under appropriate tariff provisions refund was made to the bases stated. The extent to which these scrip books were used does not appear of record. One conductor on a main-line Southern Pacific train testified that they have not been used to any considerable extent in recent years.

Under general order No. 28 of the Director General of Railroads the use of scrip books and all round-trip fares, interstate and intrastate, was abolished throughout the country, effective June 10, 1918. The Nevada commission claims that this resulted in unreasonable passenger fares in Nevada. At the hearing its chairman admitted that while he never considered the main-line fares in Nevada to be just and reasonable the granting of the round-trip fares and use of the scrip books resulted in "somewhere near a just and reasonable rate."

In New Mexico and California the intrastate fares have been increased 20 per cent, but in Nevada, Arizona, and Utah the increase was denied. The intrastate passenger revenue in Nevada of respondents for the year ended December 31, 1919, amounted to $719,237.58, of which $630,836.28 was received on a basis of 5 cents per mile or less. Most of the remainder was collected by the Tonopah & Goldfield on a basis of 6 cents. For the eight months ended August 31, 1920, the corresponding revenue was $499,590.36, of which $437,638 was on a basis of 5 cents per mile or less, and, as in 1919, most of the remainder was received by the Tonopah & Goldfield on a basis of 6 cents per mile.

These respondents estimate that if the present intrastate fares are continued for one year, and if the intrastate traffic during that year is the same as in the calendar year of 1919, the direct loss of revenue through failure to secure the 20 per cent increase in intrastate fares will approximate $145,000. Estimates based on the traffic for the first eight months of 1920 indicate that their annual "loss" would approximate $150,000.

All of respondents except the Nevada Transportation Co., operating the Eureka Nevada Railway, a narrow-gauge road, carry both intrastate and interstate passengers on the same trains with the same service and accommodations. The intrastate passenger paying the lower fare rides in the same car with the interstate passenger who pays the higher fare. The evidence shows that there are no traffic or transportation conditions in the State of Nevada which justify a lower basis of fares for intrastate transportation than for interstate. On the contrary, the average length of passenger haul interstate is several times the intrastate, as will be seen from the following table for 1919:

Respondent.	Average haul.	
	Intrastate.	Interstate.
	Miles.	*Miles.*
Southern Pacific Co.—Pacific system	72.95	305.63
Western Pacific Railroad	45.82	279.17
Los Angeles & Salt Lake Railroad	36.35	212.86
Bullfrog Goldfield Railroad	61.84	78.81
Nevada Central Railroad	77.01	77.01
Nevada Copper Belt Railroad	12.23	14.88
Nevada Northern Railway	12.51	120.48
Tonopah & Goldfield Railroad	63.57	67.42
Tonopah & Tidewater Railroad	11.19	29.94
Virginia & Truckee Railway	27.45	72.95

Similar evidence covering the eight months ended August 31, 1920, shows approximately the same result.

It should be observed that the average insterstate haul of the lines that cross the State includes not only traffic to or from points in Nevada but the haul in Nevada on traffic that crosses the State.

The train-mile earnings from passenger traffic are said to be naturally higher in States more densely populated than Nevada. It is also shown that the earnings per train-mile from passenger traffic are greater on through interstate trains crossing Nevada than on local trains within Nevada. An exhibit shows earnings on certain local branch-line trains of the Southern Pacific ranging from 14 cents to $1.62 per mile, while earnings on representative through interstate trains for the first 10 months of 1920 range from $2.79 to $3.60 per mile. The greater part of intrastate passengers on the main lines in Nevada are carried on through interstate trains.

To show that, so far as passenger traffic is concerned, local stations in Nevada are maintained principally for intrastate business, respondents introduced exhibits as to ticket sales. Thus, during three months ended October 31, 1920, the total ticket sales at 34 stations of the Southern Pacific were, interstate 6,342, intrastate 23,700. This does not include Reno, where interstate ticket sales predominate. The ratio of intrastate to interstate is even greater on the short lines in Nevada.

The record contains many illustrations of the way in which the Nevada intrastate fares have the effect of reducing the earnings on interstate traffic, or rather on what would be interstate traffic if it were not for the difference in fares. Passengers coming from or destined to points outside the state find it cheaper to pay the intrastate fare within Nevada and the interstate fare beyond the border than to pay the through interstate fares for the whole journey. Station agents and conductors testified that this practice was growing and difficult to eliminate. The situation is aggravated by the fact that holders of scrip books which represent so much cash can defeat the through interstate fares without leaving the train. This practice tends to break down the interstate adjustment.

The difference in the level of the fares tends to prejudice localities outside the State of Nevada. Reno is by far the largest jobbing center in the State. Prior to August 26, 1920, the one-way fares from Goldfield to Reno and San Francisco were respectively $14.15 and $22.65. At the present time they are $14.15 and $27.18, respectively. No round-trip fares are now in effect. A passenger can go from Goldfield to Reno and return for $28.30. To San Francisco and return he must pay $54.36, a difference in favor of Reno of $26.06, whereas prior to August 26 the difference in favor of Reno was $17. It appears that during the summer season round-trip fares less than double the one-way fare have been published from Goldfield to San Francisco. Again, Palisade, Nev., is approximately the same distance from Reno and Salt Lake City, and prior to August 26, 1920, the fares were on the same basis. Now, the fare from Palisade to Salt Lake is on a basis 20 per cent higher than that of the fare to Reno.

The Western Pacific and the Southern Pacific have many stations common to both in eastern Nevada. From Reno to these points the route of the Southern Pacific is intrastate, but that of the Western Pacific is for about 50 miles in California. As stated before, the fares from Reno to these stations from the time of the opening of the Western Pacific until August 26, 1920, were approximately the same. The fares over the interstate route of the Western Pacific have been increased 20 per cent. Those over the intrastate route of the Southern Pacific to the same destinations have not, with a resulting difference ranging from $1.41 at Winnemucca to $2.87 at Wells. This relation of fares was made the subject of informal complaint to the Nevada commission and elicited from the chairman of that commission the following expression to complainant:

"There is no good reason, as we view it, why the Western Pacific should charge higher fares between Reno and other points throughout the State of Nevada than are charged by the Southern Pacific, nor do we believe that the company will desire to continue such a business policy for any great length of time. It is within the power of the Western Pacific Railroad to reduce its fares to the bases of those charged by the Southern Pacific within Nevada."

It was testified that the inevitable effect of this situation will be to force a reduction of the Western Pacific fares unless the Southern Pacific fares are increased.

What has been said with reference to passenger fares applies with equal force to the surcharge for space in Pullman or parlor cars and the excess-baggage charges. Respondents estimate that their loss due to failure to secure the surcharge will approximate $12,500 annually, based on the traffic during 1919.

The Nevada commission compared passenger fares in Nevada with passenger fares per mile in other States, but with no showing as to similarity of transportation conditions. The average revenue per passenger mile received by the Western Pacific, Los Angeles & Salt Lake, and Southern Pacific for their systems as a whole is naturally less than that received in Nevada on account of the lower basis in California, and, in the case of the Southern Pacific, on account of the heavy commutation travel in and out of San Francisco and other bay points. The Nevada commission also submitted evidence as to passenger earnings for railway systems in various parts of the country which are of little value in this proceeding.

The record does not warrant a finding with respect to the relationship of intrastate and interstate commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, or club-car charges.

The intrastate movement of milk and cream in Nevada is negligible, and no evidence was offered with reference thereto.

II. FREIGHT RATES.

The Nevada commission admitted at the hearing that the Nevada State rates were on a just and reasonable basis prior to the increases under general order No. 28, and that it had diligently sought to harmonize those rates with rates in effect in California and elsewhere. Prior to Federal control the Nevada rates had been subjected to many reductions aggregating several hundred thousand dollars annually. The further admission was made that its opinion as to the justness and reasonableness of the rates in effect in 1917 was based on a valuation hereinafter considered.

Respondents estimate that their failure to secure a 25 per cent increase in intrastate freight rates will result in annual loss of approximately $340,000, based on the traffic for 1919, or based on the traffic for eight months of 1920, approximately $397,000. They show that the average haul on traffic in Nevada is much longer interstate than intrastate.

The tonnage of intrastate freight handled in several States of the mountain-Pacific group is stated as follows:

Year.	Nevada.	Arizona.	Oregon.	California.
	Tons.	*Tons.*	*Tons.*	*Tons.*
1912	212,220	190,925	1,289,365	12,925,345
1913	166,124	181,844	1,341,404	12,855,390
1914	132,492	137,269	1,686,451	12,442,115
1915	66,210	114,152	1,183,000	12,462,166
1916	73,227	305,258	1,631,685	13,953,716
1917	86,722	522,728	2,193,087	14,531,439
1918	89,008	505,876	2,572,350	13,120,565
1919	76,298	(1)	2,679,867	(1)

[1] No record was maintained during 1919 segregating interstate and intrastate traffic in California and Arizona.

Prior to August 26, 1920, class rates for application to interstate and intrastate traffic in Nevada were generally on the same basis. In Traffic Bureau of Merchants Exchange *v.* S. P. Co. (19 I. C. C., 259), decided June 6, 1910, we prescribed a maximum scale of class rates from Sacramento, Calif., to points on the main line of the Southern Pacific in Nevada. In 1913, the Nevada commission prescribed a distance scale of class rates for application where no specific class rates were named between points in Nevada on the main line of the Southern Pacific; specific class rates between Reno, Lovelock, Winnemucca, Elko, and other main-line points on the Southern Pacific; and specific class rates between the points named and points on the branch lines of the Southern Pacific south of Hazen. The carriers in publishing the rates so prescribed made them applicable also to interstate traffic in cases where no specific rates were in effect. The reduction in rates to points south of Hazen resulted in reduction of rates to points on the Tonopah & Goldfield. On April 20, 1914, the Nevada commission ordered a further reduction in all rates from Reno to certain points on the Tonopah & Goldfield, and this was made with specific reference to rates from California. The rates in effect June 24, 1918, on the Nevada Northern were the result of drastic reductions ordered by the Nevada commission in 1912.

In the Goldfield cases (34 I. C. C., 360), decided June 17, 1918, in discussing rates to points on the Tonopah & Goldfield, Bullfrog Goldfield, and Tonopah & Tidewater, we said at page 370:

"The rates on all these lines from the east and from the west, were reduced in 1910 by the order of the commission respecting class rates from Sacramento to points in Nevada, 19 I. C. C., 259. The rates formerly in effect from Sacramento to Hazen, Nev., were as follows:

Classes	1	2	3	4	5	A	B	C	D	E
Rates	129	113	102	87	78	78	34	33½	25½	25½

"The order of the commission reduced these rates to the following:

Classes	1	2	3	4	5	A	B	C	D	E
Rates	85	71	64	51	43	43	34	28	25	21

"The direct effect of the order was to reduce the rates from California points to points in Nevada, but owing to the fact that many rates from eastern points were made by combination over San Francisco, Sacramento, or Los Angeles, reductions were thus brought about from eastern points to this territory. The various orders of the Nevada Railroad Commission have also had the effect of reducing the rates on some of these railroads. A rather notable case is one concerning the rates on forest products from Verdi, Nev., to Tonopah and Goldfield, which resulted in very material reductions in the rates on mining timbers and other lumber."

We found on page 376 that the rates on many commodities from various points in the United States had not been shown to be unreasonable or otherwise unlawful, and the pending complaints were dismissed.

The distance class scale in effect June 24, 1918, on the Los Angeles & Salt Lake was that established when the line was opened in 1905 and was the same for intrastate and interstate application. The operating conditions over this carrier's line in Nevada are much more severe than elsewhere, except for a severe grade between San Bernardino and Summit, Calif., about 20 miles. In Nevada it runs through desert country and a canyon about 150 miles long known as the Meadow Valley Wash. Fuel and water must be hauled from distant sources of supply, labor difficulties have been frequent, and the road has been closed for intervals ranging from 10 weeks to 6 months because of slides and washouts in the canyon.

Lumber is one of the principal commodities moving in Nevada, both interstate and intrastate. A mill at Verdi, Nev., a few miles east of the Nevada-California line, is in competition with mills in the Truckee River district of California. All these mills cut the same kind of timber and manufacture the same kinds of lumber. They have always been in the same rate group on movements to practically all points, except that to Reno, Tonopah, and Goldfield the rates from Verdi were slightly lower and to near-by California points slightly higher than from the other mills. On westbound shipments the same parity still exists, as the California intrastate rates have been increased by the same percentage as the interstate rates, but Verdi now has an advantage to points in Navada. To the Tonopah and Goldfield district, the largest consumer of forest products in Nevada, the former advantage of Verdi over Westwood, Calif., has been increased from 2.5 cents to 14.5 cents per 100 pounds, and over Truckee from 4 cents to 16.5 cents. There is also a heavy movement of forest products to this district from Oregon and California mills, moving all rail or water to San Francisco, Los Angeles, or San Pedro, and thence by rail. It is said that the rates for this movement have always been made with relation to the rates from Verdi and the Truckee River district. In 1910 the Nevada commission reduced the rates from Verdi to Tonopah and Goldfield, thereby forcing a reduction in rates from California and Oregon. According to figures of the Nevada commission this one reduction amunted to $89,000 annually.

Flour mills at Reno, Sacramento, Ogden, and Salt Lake City compete actively for Nevada business. The rate on flour from Reno is blanketed from Carlin, 292 miles east of Reno, to the Nevada-Utah State line. This rate is 46 cents and, prior to August 26, 1920, the rate from Sacramento was also 46 cents. To intermediate points between Reno and Carlin, the advantage of Reno over Sacramento ranged from 31 cents to 4 cents. Sacramento now pays 57.5 cents to the points blanketed east of Carlin, while Reno still enjoys the 46-cent rate, and the differentials to the intermediate points now range from 40 cents to 15.5 cents.

In Utah-Idaho Millers & Grain Dealers Association *v.* Railroad Co. (42 I. C. C., 648), we found that the rates on flour from points in Utah and Idaho to destinations in Nevada and California were unreasonable and unduly preferential to the extent that they exceeded by more than 5 cents per 100 pounds the rates on wheat then in effect from and to the same points. The rates then in effect on wheat were found to be not unreasonably low. We found that the rate on flour from Ogden to San Francisco applied to a blanketed territory of destination extending east to Avenal, Nev., a distance of 550 miles. On August 25, 1920, the rate was 46 cents and under Ex parte 74 was increased to 57.5 cents. The same rates generally applied from Salt Lake City. As stated before, Palisade is approximately equidistant from Reno and Salt Lake. Prior to August 26, 1920, Ogden had an advantage of 1 cent over Reno at Palisade and 5 cents over Reno at Carlin, a point just east of Palisade. On and after August 26 Reno had an advantage at Palisade of 9.5 cents and at Carlin of 4.5 cents. At Tecoma, the first station in Nevada on the Southern Pacific west of the Nevada-Utah State line, Reno is now at a disadvantage of only 1 cent. The distances from Reno and Ogden to Tecoma are, respectively, 426 and 113 miles.

There are packing houses at Reno, Sacramento, Oakland, and San Francisco. From Nevada points the rates on fat cattle are generally the same to the three California points named, but to Reno prior to August 26, 1920, the differential under these points ranged from $26 per standard 36-foot car at Tecoma to $64 at Hazen 45 miles east of Reno. As the rates to Reno have not been increased the differentials now range from $57.50 per car at Tecoma to $89.50 at Hazen. It was testified that the rates in effect prior to June 25, 1918, date of their increase under general order No. 28, had been in effect for many years.

Cyanide of potassium is consumed in considerable quantities at points in the Tonopah-Goldfield district. It is usually shipped from Perth Amboy, N. J., or Niagara Falls, Ontario. The joint through rate to Tonopah and Goldfield is $4 per 100 pounds. To Hazen, Nev., it is $2. The intrastate rate from Hazen to these two points is $1.60, thus cutting the through rate 40 cents. This commodity can be loaded to capacity of the car and on a shipment of 100,000 pounds the through rate could be defeated to the extent of $400. The Nevada commission attacks the factor south of Hazen of the joint through rate and claims that to increase the intrastate rate to $2 would be unreasonable. No cyanide of potassium is produced at Hazen and we must look at the through rate from point of origin to final destination. In the Goldfield cases, supra, we found that a rate of $2.08 on this commodity from San Diego and San Francisco to Tonopah in effect during the period from January 18 to September 24, 1912, and a rate of $1.92 in effect during the period from November 29, 1913, to December 15, 1914, had not been shown to be unreasonable. The $2 rate from Perth Amboy and Niagara Falls to Hazen is also applicable to San Francisco and other California terminals and is said to be water compelled.

There is evidence with respect to the competitive routes of the Western Pacific and the Southern Pacific between Reno and points in eastern Nevada. It is obvious that if the intrastate rates of the Southern Pacific are not increased the interstate rates of the Western Pacific will have to be reduced or the Western Pacific must retire from the business. The Nevada commission sought to prove that the operating conditions over this longer route are more severe than over the Southern Pacific, and that the rates should be fixed with reference to the Southern Pacific and not to the Western Pacific. It contends that if rates are reasonable over the Southern Pacific it would be unreasonable to increase them in order to allow the Western Pacific to compete on rates profitable to it. The Western Pacific did not enter Reno until 1917. It then adopted the rates in effect between Reno and points common to it and the Southern Pacific, many of which had been prescribed by the Nevada commission in 1913.

There are many illustrations of record as to the manner in which the through interstate rates can be defeated by forwarding to a Nevada point, taking delivery, and reshipping. This is not always practicable but on some commodities it could be done with considerable saving.

The Nevada mining interests urgently insist that they can not stand an increase in ore rates. The same contention was made before us in Ex parte 74 by the chairman of the Nevada commission. The movement of ores to Nevada smelters is largely intrastate. There are smelters at Wabuska and Ely, and a mill for the treatment of ores at Millers. The smelter at Wabuska has been

closed since February, 1919, because of the condition of the copper market. Prior to its closing this smelter drew ores from California and Nevada, and the rates on such ores from certain California points are now before us in No. 11396, Mason Valley Mines Co. *v.* W. P. R. R. Co. The principal intrastate movement of ores in Nevada is over the Tonopah & Goldfield and the Nevada Northern. The general manager of the Tonopah & Goldfield testified that even if authority was granted his road would not increase its ore rates, and that there was an identity of interest between the road and the principal mine served by it. No specific evidence with reference to ore rates on the Nevada Northern was offered, but in its application to the Nevada commission for authority to increase intrastate rates it excepted rates on ore. The last annual report of the Nevada Northern on file with us shows that it is controlled by the Nevada Consolidated Mining Co., which operates a mill, smelter, and several mines served by the road. The respondent carriers have not in all instances increased their intrastate rates on ore as permitted in Increased Rates, 1920, supra, and the record does not warrant a finding of undue prejudice or unjust discrimination with respect to the intrastate rates on ore.

VALUATION.

The Nevada commission submitted evidence showing segregation of value, revenues, and expenses for the State of Nevada and the systems of the trunk line respondents as a whole with a view to showing that their mileage in Nevada is more profitable than for the systems as a whole. Expenses and earnings were allocated on a somewhat arbitrary train-mile basis. In its report denying the carriers' applications for increases the Nevada commission found that $146,420,551.04 was the book cost value of the carriers' property in Nevada. In Ex parte 74 the aggregate value fixed by us is said by the Nevada commission to result in a reduction of 5.7 per cent from that claimed by the carriers. Applying 5.7 per cent to the above figure we have $138,074,571.15. The Nevada commission contends that the fair value of the carriers' property in Nevada is $79,115,222. Nothing has been submitted in support of this figure, which seems to be an estimate of that commission in the absence of any valuation made by it. To go to the full extent claimed by the Nevada commission would ultimately result in breaking up each group fixed by us into groups bounded by State lines. In Intrastate Rates within Illinois (59 I. C. C., 350) we said, at page 364:

"It is further urged that in Increased Rates, 1920, we did not find the value of any railroad property in the State of Illinois or elsewhere in the eastern or western groups as designated in that report. We were directed to prescribe rates so that in the aggregate they would yield a certain return, as nearly as may be, 'upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.' We understand the interstate commerce act to require us to determine upon a valuation for the total property of the carriers and not for the property that might by some necessarily arbitrary method or formula be assigned to interstate traffic, and that is the course we followed in arriving at the estimated value used in Increased Rates, 1920."

The Nevada commission compared many class and commodity rates for hauls in Nevada with rates for hauls of similar distances in other States. Thus, comparison is made of class rates and rates on some 42 commodities from Sacramento to Greenwood, Calif., and from Boise to Doran in Idaho, which are said to represent hauls of approximately the same distance as those from Reno to Lovelock and between points on other lines in Nevada; also of Nevada rates with rates from San Francisco to many points in California; rates from points outside Nevada to points within the State; and transcontinental rates.

This and similar evidence was unaccompanied by any showing of transportation conditions or of movement of the commodities named, and is of little probative value. From tariffs on file with us it appears that Greenwood and Doran are nonagency stations.

Comparison was also made of the intrastate class rates between main-line points on the Southern Pacific and the maximum class scale prescribed by us in the Memphis Southwestern Investigation (55 I. C. C., 515), as follows:

	Classes.									
	1	2	3	4	5	A	B	C	D	E
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
50 miles:										
Nevada intrastate scale [1]	40	35	31	27	25	25	17	14	12	9
Memphis - Southwestern scale	36.5	31	25.5	22	17.5	18.5	14.5	12.5	11	9
100 miles:										
Nevada intrastate scale [1]	60	51	43	39	36	36	24	10	15	12
Memphis - Southwestern scale	51.5	43.5	36	31	24.5	27	20.5	18	15.5	13
150 miles:										
Nevada intrastate scale [1]	80	68	56	50	46	46	32	24	20	16
Memphis - Southwestern scale	66.5	56.5	46.5	40	32	35	26.5	23	20	16.5
200 miles:										
Nevada intrastate scale [1]	100	85	70	63	58	58	40	30	25	20
Memphis - Southwestern scale	77	65.5	54	46	37	40	31	27	23	19
300 miles:										
Nevada intrastate scale [1]	133	113	93	83	76	76	53	40	33	27
Memphis - Southwestern scale	96	81.5	67	57.5	46	50	38.5	33.5	29	24
400 miles:										
Nevada intrastate scale [1]	155	132	109	97	89	89	62	47	39	31
Memphis - Southwestern scale	111	94.5	77.5	66.5	53.5	57.5	44.5	39	33.5	28

[1] Nevada intrastate scale between main-line points on the Southern Pacific in effect June 24, 1918.

The Memphis-Southwestern scale as prescribed by us, and as used in this table, did not include the 25 per cent increase under general order No. 28. The rates within the territory in which this scale applies were later increased by 35 per cent under Ex parte 74. No showing was made of similarity of transportation conditions in the territories where these scales are respectively applicable. It will be seen that for 100 miles and less the Nevada intrastate scale in effect June 24, 1918, did not greatly exceed the Memphis-Southwestern scale. If the increases under general order No. 28 and Ex parte 74 were applied to this scale it would in many instances be higher than the present Nevada intrastate scale. The average haul on intrastate traffic in Nevada over the Southern Pacific in 1919 was 100.25 miles and for the first eight months of 1920 was 93.68 miles. As stated before the Nevada intrastate scale was prescribed by the Nevada commission in 1913, and was made applicable by the Southern Pacific on interstate traffic. On June 25, 1918, it was increased 25 per cent and on August 26, 1920, it was increased 25 per cent for interstate application.

Much of the evidence in Ex parte 74 to which the Nevada commission refers has little or no bearing on the relationship of interstate and intrastate rates within Nevada and is really put forward in support of its contention that interstate rates to and from Nevada points are unreasonable and prejudicial as compared with interstate rates to and from points in other States.

It further contends that as the carriers submitted little evidence in the hearing before it we should refer them back to it to seek their remedy. The entire record in Ex parte 74 was before it when it denied the carriers' applications. In answer to a somewhat similar contention in Arkansas Rates and Fares (59 I. C. C., 471) we said:

"The desirability of concerted action of the State and Federal regulatory bodies in all matters of transportation in which the power of both is involved has been given recognition in the interstate commerce act. The action of respondents in bringing the matter before us in advance of the filing of an application with the corporation commission and a determination by it renders difficult the coordinated action contemplated by Congress and deprives us of the benefit of such investigation and findings as the State authorities might have made. However, we are here confronted with practical questions for the solution of which Congress has provided a practical course of procedure by means of which substantial justice is assured. Respondents have elected to pursue that course and we are not vested with appellate power under which they might be remanded to tribunals of the States."

FINDINGS.

Following the New York, Illinois, and Wisconsin cases (59 I. C. C., 290; ib. 350; ib. 391), and upon this record, subject to the exception above noted in respect to commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, and club-car charges, we are of opinion and find that the increases made by the respondent steam railroads, except the Nevada Transportation Co., operating the Eureka Nevada Railway, under Ex parte 74, relating to passenger fares and excess-baggage charges, and now in effect, result in reasonable passenger fares and excess-baggage charges for interstate transportation and that the failure of said respondents to increase the standard intrastate fares and excess-baggage charges accordingly within the State of Nevada has resulted and will result in intrastate fares and excess-baggage charges lower than the corresponding interstate fares and excess-baggage charges, in undue prejudice to persons traveling in interstate commerce within the State of Nevada and between points in the State of Nevada and points in other states, in undue preference of and advantage to persons traveling intrastate in Nevada, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice, undue preference and advantage, and unjust discrimination can and should be removed by making increases in said intrastate passenger fares and excess-baggage charges which shall correspond with the increases heretofore made by said respondents as aforesaid under Ex parte 74 and now in effect in their interstate passenger fares and excess-baggage charges within that group.

We further find that the surcharges made by said respondent steam railroads, except the Nevada Transportation Co., operating the Eureka Nevada Railway, under Ex parte 74 and now in effect upon passengers in sleeping and parlor cars result in reasonable charges upon passengers so traveling in interstate commerce, and that the failure of said respondents to make corresponding surcharges upon passengers so traveling in intrastate commerce within the State of Nevada has resulted and will result in intrastate charges lower than the corresponding interstate charges, in undue prejudice to persons so traveling in interstate commerce within the State of Nevada and between points in the State of Nevada and points in other states, in undue preference of and advantage to persons so traveling intrastate in Nevada, and in unjust discrimination against interstate commerce.

We further find that said undue prejudice, undue preference and advantage, and unjust discrimination can and should be removed by making surcharges upon passengers so traveling in intrastate commerce which shall correspond with the surcharges heretofore made as aforesaid under Ex parte 74 and now in effect upon passengers so traveling in interstate commerce.

We further find, subject to the exception above noted with respect to rates on ore, milk, and cream, that the increases made by the respondent steam railroads relating to freight rates and charges under Ex parte 74 and now in effect result in reasonable rates and charges for interstate transportation, and that the failure of said respondents to correspondingly increase their rates and charges for intrastate transportation within the State of Nevada has resulted and will result in intrastate rates and charges lower than the corresponding rates and charges maintained on interstate traffic within the State of Nevada, and between points in the State of Nevada and points in other States in undue preference of shippers of intrastate traffic within the State of Nevada, in undue prejudice to shippers of interstate traffic, and in unjust discrimination against interstate commerce.

We further find that said undue preference, undue advantage and prejudice, and unjust discrimination can and should be removed by making increases in said intrastate rates and charges as in effect July 29, 1920, which shall correspond with the increases heretofore made by said respondents aforesaid under Ex parte 74 and now in effect in their interstate rates and charges.

We further find that, whether the aforesaid passenger fares, excess-baggage charges, surcharges, or freight rates and charges pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services in each instance are performed by the carriers under substantially similar circumstances and conditions. Tariffs may be made effective on not less than five days' notice.

The above findings are abundantly supported by the record, but are without prejudice to the right of the authorities of the State of Nevada or of any other

party in interest to apply in the proper manner for a modification of our findings and order as to any specified intrastate rates, fares, or charges on the ground that the latter are not related to the interstate rates, fares, or charges in such a way as to contravene the provisions of the interstate commerce act.

An appropriate order will be entered.

Eastman, commissioner, dissents.

ORDER.

[At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of March, A. D. 1921. No. 11914. Nevada rates, fares, and charges.]

In the matter of intrastate rates, fares, and charges of the Southern Pacific Co. and other carriers in the State of Nevada.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the following-named common carriers by steam railroad, parties respondent to this proceeding, to wit: Bullfrog Goldfield Railroad Co., Los Angeles & Salt Lake Railroad Co., the Nevada Central Railroad Co., Nevada Copper Belt Railroad Co., Nevada Northern Railway Co., Southern Pacific Co., Tonopah & Goldfield Railroad Co., Tonopah & Tidewater Railroad Co., Virginia & Truckee Railway, and the Western Pacific Railroad Co., according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination, found in said report to exist in the relation of interstate and intrastate passenger fares and excess-baggage charges, and to establish, put in force, and maintain passenger fares and excess-baggage charges for the transportation of passengers in intrastate commerce within the State of Nevada which shall exceed the fares and excess-baggage charges of said respondents now in effect and applicable to such transportation in amounts corresponding to the increases heretofore made by said respondents and now in effect under Ex parte 74 in said respondents' passenger fares and excess-baggage charges for the transportation of passengers in interstate commerce within the State of Nevada, and between points in the State of Nevada and points in other States.

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate charges upon passengers traveling in sleeping cars and in parlor cars, and to establish, put in force, and maintain surcharges upon passengers traveling in sleeping cars and in parlor cars in intrastate commerce within the State of Nevada which shall correspond with the surcharges heretofore made by said respondents and now in effect under Ex parte 74 upon passengers traveling in interstate commerce within the State of Nevada and between points in the State of Nevada and points in other States.

It is further ordered, That the respondents above named and also the respondent Nevada Transportation Co., operating the Eureka Nevada Railway, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain rates and charges for freight service in intrastate commerce within the State of Nevada which shall exceed the rates and charges of said respondents, respectively, in effect July 29, 1920, and applicable to such transportation, in amounts corresponding to the increases heretofore made by said respondents under Ex parte 74 and now in effect in said respondents' rates and charges for freight service in interstate commerce within the State of Nevada and between points in the State of Nevada and points in other States.

It is further ordered, That the foregoing paragraph of this order shall not apply to rates on ore, milk, and cream.

It is further ordered, That this order shall become effective on or before April 28, 1921, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act and remain in force until the further order of the commission in the premises.

And it is further ordered, That a copy of this order be served upon each of the common carriers parties to said proceeding.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary*.

The CHAIRMAN. You are one of the States that did not obey the order of the Interstate Commerce Commission, I believe?

Mr. SHAUGHNESSY. We are one and Arizona is the other.

The CHAIRMAN. What was the effect of that action; what happened then?

Mr. SHAUGHNESSY. The effect thereafter was this, Senator, that on March 8, 1921, the Interstate Commerce Commission made its order finding that rates and fares within Nevada, except as to rates covering the movement of ore, were discriminatory, and required the carriers to remove the discrimination. Immediately after the release of the order, which our general solicitor, Mr. Benton, informed us about by wire from Washington—I say, within an hour and a half after the release of the order counsel for the various railroads in Nevada had reached the Federal court at Carson by automobile, coming from Reno, and had secured a restraining order.

The CHAIRMAN. Restraining you from enforcing the rates which you had?

Mr. SHAUGHNESSY. Yes; and from preventing them from putting in rates that would be in conformity with the decision of the Interstate Commerce Commission. That injunction was against the State commission and the attorney general and the various district attorneys of the State of Nevada. The decisions granting injunctions in the Wisconsin, Illinois, and New York cases had been rendered at that time, and appeals were under way in the United States Supreme Court. Therefore we have rested. We have not taken any action in the present case before the courts.

The CHAIRMAN. You are just waiting to see how these other cases come out?

Mr. SHAUGHNESSY. Yes. And all our people in Nevada are very desirous of having the matter clarified, and clarified by the Congress if it feels it can do so, in such a way as there may not be these contentions and these uncertainties for the future.

The CHAIRMAN. Have you considered the manner in which we could clarify it?

Mr. SHAUGHNESSY. Senator, I sincerely believe after studying the situation from all angles that the question of the Shreveport discrimination in this country has been very largely overemphasized, and that there is no good reason for a continuation of that policy. I believe that we can, perhaps, get further in this country by an elimination of the Shreveport doctrine than we can by maintaining it. In that connection I have in mind the necessity of continued cooperation of the States and the Interstate Commerce Commission.

The CHAIRMAN. Your suggestion is that by statute there should be an elimination of the doctrine laid down in the Shreveport case?

Mr. SHAUGHNESSY. That would be my position, Senator. And not only that, but cooperation with the Interstate Commerce Commission should be continued, and, perhaps more important, the necessity of bringing about a better understanding and more effective cooperation with the traffic and operating managers of the railroads within our respective jurisdictions.

It occurs to me that we are approaching a pretty dangerous line at the present time in going as far as we have gone in centralizing everything down here at Washington. I do not mean "everything" in a literal sense, and do not mean to be offensive by that statement; nor do I in any way mean to criticize the personnel of the Interstate Commerce Commission, for whom I have the highest regard and with whom I desire to work in the future in a very harmonious way. But I am of the opinion, looking at the matter from a practical standpoint, that the railway traffic managers can handle these matters within their respective State jurisdictions and before the local tribunals set up by the people and officered by men in whom the people have confidence in the respective jurisdictions or States, better than they can by centralizing it 3,000 miles away at the seat of government, or regionalizing it and then trying to operate from that standpoint. I think that all our people feel that way about it, and I am sure they became thoroughly full of regionalizing during the period of war control and operation.

The CHAIRMAN. But you know it is impossible for us to give the State commissions jurisdiction to remove discrimination against interstate commerce. We could not confer upon them any authority in that regard. Where would you get the authority to remove discriminations of that kind? You have no authority under your State laws to remove discrimination against interstate commerce.

Mr. SHAUGHNESSY. I do not request that.

The CHAIRMAN. Where would you repose that authority?

Mr. SHAUGHNESSY. The point I had in mind was that we confer power upon both the National and State tribunals to fix just and reasonable rates. Now, then, if they were not carried out——

The CHAIRMAN (interposing). Of course, those are rates inside the State?

Mr. SHAUGHNESSY. Yes.

The CHAIRMAN. But, if in fixing such just and reasonable rates for State traffic, considering only, of course, State traffic and not considering outside traffic, you did put in a discriminatory rate, such as is alleged to have been done in the Shreveport case, how would you reach any remedy?

Mr. SHAUGHNESSY. Of course, there is a difficulty about finding a remedy, but, as I suggested, Mr. Chairman, I believe that these matters could be harmoniously worked out without the arbitrary exercise of Federal power. Whenever that power is exercised you set up irritation in the local communities that is not easily eradicated.

The CHAIRMAN. You find that same irritation in the jurisdiction of the Federal courts.

Mr. SHAUGHNESSY. That is quite true.

The CHAIRMAN. A great many people resent even the presence of Federal courts in their State, or at least the jurisdiction which they exercise?

Mr. SHAUGHNESSY. Yes.

The CHAIRMAN. I do not believe you can get rid of all the irritation as between the exercise of Federal power and State power.

Mr. SHAUGHNESSY. I understand that that is the theory of our Government. You have stated that correctly. I was just thinking about a line of policy we might follow in the future that might be more harmonious than we have started out with under this transportation act, by which the States may not be ignored. This is a dengerous issue. There is a feeling, there is a wave of adverse sentiment growing and rolling from one side of this country to the other on that very issue; and, of course, nobody knows better than you, Mr. Chairman, I am sure, you who are so thoroughly informed on railroad matters and everything of that kind. You know just how it is affecting the people. But it is my firm conviction that if we can keep away from so much centralization, if we can better distribute the power, we will have more harmonious results in the respective States, and that it will be better for the carriers and all concerned.

Take the situation out in our territory, 3,000 miles away from Washington. While, perhaps, some of the larger trunk lines who have representatives here at Washington would prefer to deal with Washington, I am sure that our short-line carriers would rather deal with their authorities within the State. And I have found from discussing the matter with the representatives of States throughout the Union in the recent convention at Atlanta that that seems to be the sentiment everywhere. Some of the larger lines are, perhaps, satisfied with the present manner of regulation, but even in that connection there are a number of railway managers of the larger lines that are not entirely satisfied they are proceeding along safe lines.

The CHAIRMAN. Does that mean that you are tending toward regional Federal commissions?

Mr. SHAUGHNESSY. The danger lies in failure to keep the people satisfied and the probability of Government ownership in the event of an unforeseen emergency. There is the further objection that the transportation act places too great a restriction upon the initiative and the efficiency heretofore exercised by the railway managers.

I believe, in order to get the results we are seeking, that the initiative and efficiency of the railway operating and traffic managers should be as free from restriction as possible, and they should be encouraged to go forward in cooperation with State and Federal authorities in working out proper results, subject, of course, to the exercise of regulatory power when necessary. Unless we can secure thoroughgoing cooperation all the way along the line there is no hope for anything approaching a settlement of the railroad ques-

tion. The States will never relinquish their jurisdiction over State commerce and its instrumentalities, while at the same time the Federal Government is desirous of and continues to reach for more and more of the States' power. Mistakenly, I firmly believe, Mr. Chairman, the carriers have, since the inception of the Shreveport doctrine, been strenuously contending for freedom from the jurisdiction of the 48 States—or the 48 masters, so called—and they believe that the Federal Government is the place where all the power should be lodged. But I believe I note a change in the minds of some of the operating managers; that they feel they are perhaps going too far. Cooperation with the States is indispensable to do the continued welfare of the carriers.

There is another thing, too; that by loosening this thing up by some plan that will enable State commissions to function within their own jurisdictions and without continual interference from the outside, you will relieve greatly the burdens of the Interstate Commerce Commission down here, and it will assist the Interstate Commerce Commission; it will free it from much of the hostile criticism that it now suffers from.

During the past year or year and a half, during the time the transportation act has been in effect, the Interstate Commerce Commission has, of course, as we all know, been badly loaded up with business. It has not been able to expedite business and get it all out of the way. There is a good deal of criticism on that score. And there was very severe criticism from those interested in effective regulation covering the live-stock case; that the commission had gone forward in a temporizing way in that case, and that it had left to the jurisdiction of the railroads the fixing of rates. The commission has, however, redeemed itself in the hay and grain rate case just decided. The opinion is a strong one and is meeting with approval everywhere.

Now, then, Mr. Chairman, perhaps we have not been properly advised as to all our powers, but we have not undertaken to exercise our functions to regulate and fix just and reasonable rates since this action was taken by the Interstate Commerce Commission. There is the feeling in our State that things are rather frozen up, and that they are frozen up in such a way that the people can not exercise their own legal functions of government and that the Interstate Commerce Commission is responsible for that condition.

The CHAIRMAN. I would be very glad if you would put into form your suggestion about repealing or modifying the Shreveport decision, inasmuch as you are the first one who has suggested it.

Mr. SHAUGHNESSY. I will be very glad to undertake something along that line, Senator, for your consideration and for the consideration of your committee, because I do think it is something worth while to begin to think about.

(Pursuant to request of the chairman, Mr. Shaughnessy submitted a bill, which is here printed in full.)

"A BILL To amend section 3 of the interstate commerce act, as amended by the transportation act, 1920, and paragraph (3) of section 13 of said act, as amended, and to repeal paragraph (4) of said section 13 of said act.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That paragraph (1) of section 3 of the interstate commerce act, as amended, be amended to read as follows:

"'(1) That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That nothing in this act contained shall be construed to limit in any degree the power of a State to prescribe with final effect the rates, fares, and charges which shall be imposed and collected for the transportation of passengers or property or the transmission of intelligence by wire or wireless between points within such States, and otherwise to regulate such transportation and transmission, which power is expressly recognized in the several States, and left unaffected by anything contained in this or any other section of this act.'

"SEC. 2. That paragraph (3) of section 13 of said interstate commerce act, as amended by section 416 of the transportation act, 1920, be amended to read as follows:

"'(3) To the end that full information may be developed upon which, after hearing, all necessary adjustments of rates may be made by State and Federal

authorities, respectively, the commission may confer with the State authorities having regulatory jurisdiction over the class of persons and corporations subject to this act, with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State authorities and of the commission, and, together with such State authorities, the commission may also confer with the representatives of carriers and shippers. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the performance of its duties under any provision of this act.'

"SEC. 3. Paragraph (4) of said section 13 is hereby repealed."

Mr. BENTON. Mr. Chairman, I would like to have you ascertain, if you can, from Mr. Shaughnessy, whether that is his solitary opinion or that he has any means of judging whether that opinion is held by other State commissioners, and, if so, to what extent?

The CHAIRMAN. Suppose you answer that question.

Mr. SHAUGHNESSY. Yes, Mr. Chairman; I should have referred to that, but overlooked it. At the Atlanta convention of the National Association of Railway and Utilities Commissioners a majority—in fact, a very large majority—of the commissioners present were strong for the adoption of a resolution memorializing the Congress to abandon the Shreveport powers of the Interstate Commerce Commission—to wipe them out entirely. That was considered, and then it was thought by some other commissioners that it might be wiser to bring to this committee a proposal or resolution asking that the committee define and limit the powers of the Interstate Commerce Commission in Shreveport cases. The way the matter is being handled to-day, of course we know that the carriers contend that practically every rate in a State is susceptible to discrimination, except, of course, something of a purely local character like you referred to awhile ago about potatoes. It is obvious there could not be any discrimination in that matter.

The CHAIRMAN. I do not understand from what I have heard from them, which is, of course, altogether in the hearings we have had, that they base that upon any other principle than that each State in its business should raise for interstate carriers its fair share of revenue required for the operation of the properties. I do not believe any of them so far overlook the actual situation as to claim that a mere difference in rate interferes with interstate commerce. I have never heard that claim made and I know it is not true. I can name hundreds of rates in my own State that do not interfere with interstate commerce, no matter whether high or low. However, you may turn your hand to that proposition if you will and see how well you can succeed in working out some plan as suggested by you for a modification of the Shreveport decision.

Mr. SHAUGHNESSY. All right, Senator.

The CHAIRMAN. Is there anything further?

Mr. SHAUGHNESSY. Yes, sir. I want to direct your attention on this question of undue discrimination, or whatever they want to call it, and the operation of it as it affected us, on the matter of passenger fares. That will probably bring to your mind something that will be worth while. In all the States surrounding Nevada, Arizona, and New Mexico and the western portion of Utah and the eastern portion of California, in the Sierra Nevada Mountains, a short distance over the Nevada line, the rates are upon the basis of 3.6 cents per mile. When this proceeding arose and the Interstate Commerce Commission came in to examine our rates, the fares that we had in effect on the main lines of the Southern Pacific and the Western Pacific Railroads were 4 cents per mile, and on the branch lines they were 5 cents per mile. Because of a hangover in the State of California on one side and into Utah on the other, where the rates had been increased, they required us, without regard to whether the rates were just and reasonable, to increase our rates from 4 cents per mile to 4.8 cents per mile on the main lines and from 5 to 6 cents per mile on the branch lines. The same action was taken in Arizona and with the same result.

This action in Arizona, New Mexico, and Nevada is defended because the volume of traffic is relatively small, but it is the exact converse of the action taken in all other States, where fares, irrespective of volume, were raised from 2 cents to 3 cents per mile and later increased 20 per cent, and are now uniformly 3.6 cents per mile. Upon petition of these States for the same treatment accorded other States, an examiner of the Interstate Commerce Commission heard the case at Los Angeles more than a year ago, and has reported adversely for the reason aforesaid. We are not informed at this time when it will be reached for argument before the commission.

The CHAIRMAN. Then you were required to increase them 20 per cent?

Mr. SHAUGHNESSY. Yes, sir; that is it. Now, on the Los Angeles and Salt Lake Railway, a part of the great Union Pacific system, they had in that section fares of 5 cents per mile on the main line and 6 cents per mile on the branch lines. They increased those rates 20 per cent, making the fares throughout southern Nevada on that line 6 cents per mile on the main line and 7.2 cents per mile on the branch lines. And we have freight rates that are extortionate, absolutely extortionate. Just think for a 400-mile haul from Reno to Cobre, Nev., they increased the rate of $1.92, first-class scale, to $2.40. That used to be a good rate all the way from the Missouri River to San Francisco. Compared with that, for a haul of 646 miles from San Francisco to Cobre, Nev., at which there is a junction with the Nevada Northern Railway, running down to Ely, the first-class rate scale runs into the Reno class-rate scale of $2.40. That rate had been increased from $1.92 to $2.40 in Ex parte 74. Our rate under this decision had to come up for the 400-mile haul from $1.92 to $2.40, or to the same level as for the 646-mile haul from San Francisco.

Those are some of the inequalities and some of the injustices that flow from this character of regulation, and I am sure, Mr. Chairman, that it is not going to be satisfactory. That is wholesale regulation without regard to any consideration other than levels of rates.

The CHAIRMAN. You might use a stronger term.

Mr. SHAUGHNESSY. Yes; I wish I could think of one.

The CHAIRMAN. Instead of removing discrimination it creates discrimination.

Mr. SHAUGHNESSY. Yes. It does, in fact.

Now, for a 244-mile haul from Reno to Tonopah, Nev., the fourth-class rate was increased from $1.45 to $1.81½. Immediately thereafter all the traffic began to move by parcel post—everything that had moved, under first to fourth class. Recently the carriers have just put in a rate of $1 to meet the parcel-post rate which, from Reno to Tonopah is $1.08.

The fifth-class rate on sugar and canned goods from San Francisco to Tonopah and Goldfield, Nev., a distance of approximately 500 miles, was increased from $1.83 to $2.28. Recently, without any action on the part of our commission or on the part of the Interstate Commerce Commission, the carriers have reduced this rate to $1.50. That was for the purpose of meeting the parcel-post competition out of both San Francisco and Los Angeles.

The CHAIRMAN. I suppose you have not any intrastate traffic in those commodities to amount to anything?

Mr. SHAUGHNESSY. We have from Reno. From Reno they have put in this rate of $1 that I have just referred to, as compared with the increased rate put in by the order of the Interstate Commerce Commission.

Just to show you that the level of everything is very high in Nevada, the rate on sugar from San Francisco to Imlay, Nev., a distance of 385 miles is 96 cents, which rate blankets to Kansas City, Mo., a haul of over 1,900 miles, and with the rate of 78 cents on canned goods for a haul from San Francisco to Reno and thence to New York City and points intermediate. It hits 78 cents at about Reno, Nev., and then blankets to Utah common points, distance about 800 miles, then reaches $1.05 and blankets to New York City and intermediate points.

The CHAIRMAN. When the interstate rate was reduced by the railroads themselves, did your State rate go down accordingly?

Mr. SHAUGHNESSY. They put in an intermediate clause that the rates intermediate should not exceed those to the farther distance points, but they did not work them out progressively according to the mileage, if that is what you mean.

While I am on the question of rates, I want to refer to the fact that I appeared before the Interstate Commerce Commission in Ex parte 74, at which time I earnestly requested that exception be made on ore rates. This testimony was based upon investigations which I had made in Nevada with the manager of the Western Ore Purchasing Co., who buys ore throughout the State, which showed that as a result of the increase in General Order 28, 60 per cent of small shipping mines had to close, as the result of the ensuing increase in the price of powder, timbers, mine supplies of all kinds, and the increased cost of labor.

I very strenuously urged in Ex parte 74 that ores moving out of Nevada to the Utah and California smelters should be exempted from any further increase of that kind, and my recommendation was predicated upon the testimony of the manager of the Ore Purchasing Co., who was buying throughout the State,

that this further 25 per cent horizontal increase would wipe out practically all the shipping mines, and it has had this effect.

I also showed, from the monthly reports of the Nevada Consolidated Copper Co., at Ely, and in connection with statements from the general manager of that company, that it would affect their operations in this manner. They were then operating on 18-cent copper; that was the selling price of copper at that time. He showed that for the year 1919—and the annual report confirmed the statement—the net income of the Nevada Consolidated Copper Co. for 1919 was $336,000, and that if the 25 per cent increase were to apply to his coal and his oil and his timbers and his supplies, and to his copper outbound, the increase in his transportation bill for the future would be $345,000 per annum, or $9,000 in excess of the net earnings of the company for the year 1919.

I also covered the Pioche district in the same detail. The Pioche district in Nevada includes numerous mining companies, and they were shipping to the Utah smelters on the basis of from 500 to 600 tons of ore per day. This was a low grade of ore, so low that after taking out mining costs and transportation costs and smelting charges, and everything of that kind, the profit to the owner was approximately 30 cents a ton. The managers of those various properties were wiring me while I was here attending that hearing, telling me all these facts, and they sent a representative in with a statement from the United States Smelting Co., showing exactly what the facts were in that respect.

It also appeared, and I showed at that time, that from this traffic, very low grade as it was, the Los Angeles & Salt Lake Railway were loading their empty coal cars back in the direction of the Utah mines, and their empty foreign coal-car equipment with these ores from the Pioche district, and that the road as a result of that business was making $300,000 per annum from it.

I also represented Arizona to some extent upon the same lines, upon the request of the commission in that section, where they were confronted with the same considerations.

The order in Ex parte 74 was made, however, without providing for this exception that I have referred to, and that has been very, very hurtful to Nevada. The paramount industry of Nevada is mining, and, of course, without something being done in that connection we are pretty bad off.

The CHAIRMAN. Mr. Shaugnessy, I do not quite see the materiality in this hearing of those suggestions, because they relate to rates which are undoubtedly within the jurisdiction of the Interstate Commerce Commission, which I assume no one would think of taking away from them.

Mr. SHAUGHNESSY. You are quite right. I just wanted to emphasize our situation to that extent.

In that connection it is very important that we should retain jurisdiction of our intrastate rates, because we have many mills, and we have two smelters within our State, one of which will become a custom smelter, or expects to become a custom smelter, providing they can secure rates covering the movement of ores from a near-by California district, and which case has been under submission before the Interstate Commerce Commission for decision on the basis of a favorable report of the examiner for about a year.

I would like to offer in evidence a copy of the decision of the Nevada commission in this advance rate matter. I also want to offer resolutions adopted by the Intermediate Rate Association, comprising 5 State commissions and nearly 100 farm bureau, commercial, and industrial organizations in convention at Salt Lake City, Utah, June 13, 1921 [reading]:

"Whereas the Interstate Commerce Commission under its construction of the transportation act of 1920, has assumed jurisdiction over all matters, interstate and intrastate, relating to rates, fares, and charges, directly or indirectly, of the common carriers of the country; and

"Whereas we believe that such assumption of authority by the Federal Government constitutes an unwarranted and unconstitutional encroachment upon reserved and inherent rights and powers of the sovereign States; and

"Whereas we believe that such delegation of power to the Federal Government, if it were constitutional, would be inadvisable since obviously because of the great distance from the seat of Government, it would have to be administered through subordinates unfamiliar with local conditions; perhaps disinterested in the growth and development of districts far removed from the capital and having no personal feeling of responsibility in the momentous problems before them; and

"Whereas we believe that the continuance of the policy inaugurated by the Interstate Commerce Commission in this respect will handicap and retard the progress and development of the industries and commerce of the Nation and create a dangerous menace to the exercise of the sovereign rights of the States; and

"Whereas we believe that the transportation act of 1920 should be immediately amended so as to remove any possible ambiguity relating to State and Federal jurisdiction, and that the exclusive power of the States over matters of purely internal character should be at once reaffirmed and so thoroughly and definitely established that there can never again be a question of doubt raised with reference thereto: Therefore be it

"*Resolved*, That the Intermediate Rate Association, in convention assembled, record the unalterable opposition to centralized Federal control over intrastate commerce and that it urge upon Congress the necessity of at once amending the transportation act of 1920 in consonance with the views herein expressed; and be it

"*Resolved further*, That copies of this resolution be sent to our delegates in Congress, with the request that they immediately caucus and determine which of the various bills now pending before Congress is best suited for the accomplishment of the purpose herein designed, and that thereafter united, concerted, and vigorous efforts be constantly made for its passage at the earliest possible date of the present session."

"Whereas the transportation act of 1920 purports to place in the hands of the Interstate Commerce Commission exclusive jurisdiction to grant or deny certificates of convenience and necessity relating to the construction of railroad lines and facilities, or the abandonment or discontinuance thereof; and

"Whereas the exercise of this power by the Federal Government might result in great inconvenience and discomfort to the general public and irreparable financial loss to individuals and communities; and

"Whereas the carriers are incorporated in and receive their only authority for corporate life and activity from the States wherein they are incorporated, and should, therefore, be subject to the authority under which they exist for their corporate acts: Therefore be it

"*Resolved*, That the Intermediate Rate Association, in convention assembled, express its firm conviction that the transportation act of 1920 should be at once so amended as to eliminate the objectionable provision above referred to and to restore to the States their rightful authority over the children of their creation; and be it

"*Resolved further*, That copies of this resolution be forwarded to our delegates in Congress and that they be requested to secure the passage of a suitable amendment for the accomplishment of the above purpose at the present session of Congress."

"Whereas that section of the transportation act known as section 15a, carrying a mandate to the Interstate Commerce Commission to fix such rates as will insure a return of 5½ per cent or 6 per cent on the aggregate value of the railroad property has resulted in the levying of rates which have stifled commerce and prevented the free movement of commodities; and

"Whereas the agricultural and horticultural interests of the entire Nation are to-day practically at a standstill, the food products unable to reach the consuming markets, largely as a result of rates that have been fixed under the provision of this section of the transportation act: Therefore be it

"*Resolved*, That the Intermediate Rate Association, in convention assembled, urges upon Congress immediate legislation for the repeal of this section of the act to regulate commerce and the support of Senate bill 1150, introduced by Senator Capper, or any other similar measure."

The CHAIRMAN. You believe that the railroads ought to have enough income to keep them in operation?

Mr. SHAUGHNESSY. Yes; Mr. Chairman.

The CHAIRMAN. Or at least enough to pay the wages of the men?

Mr. SHAUGHNESSY. I am in full accord with giving the railroads fair treatment.

The CHAIRMAN. They have got to get it from some source?

Mr. SHAUGHNESSY. Yes. I think you will find, too, Mr. Chairman, in that connection, that there has been a good deal of pretty harsh criticism put in before your committee of the action taken by the respective State commissions throughout the country. Some of that has been pretty badly turned, and is unfair. It has been turned in such a way as to make it appear that if these railroads were turned loose and put into the hands of the State railroad commissions without the supervision of the Interstate Commerce Commission they would all be in bankruptcy or in the hands of receivers about as soon as respective State legislatures could meet or the commissions could meet and bear down rates. Well now, that is not the sentiment among the members of the various State commissions. I am sure the discussion that prevailed at Atlanta would entirely disabuse the mind of anybody on that score.

The CHAIRMAN. That is a very difficult question, of course. I do not agree with you, or with that resolution, that section 15-a has increased rates; I think they would have been increased just as much without it.

Mr. SHAUGHNESSY. They would have been increased in any event. That is your idea, Senator?

The CHAIRMAN. My idea is that the railroads will not earn this year more than enough to pay the interest on their bonds, and probably not that much. But I do not look upon it as a matter of any great importance, because the particular thing you have in mind will in any event take place on the 1st of March, and, of course, there will be no increase in rates before that time.

Mr. SHAUGHNESSY. Well, at that time there will be a fixing of the percentage rate of return; that is all, as I understand it.

The CHAIRMAN. Well, that was their duty before—that has been declared over and over again—to fix rates that will yield a fair rate of return.

Mr. SHAUGHNESSY. But, Senator, would it or would it not, in your judgment, be better to eliminate the mandates, so called, and instead give to the Interstate Commerce Commission broad general power, such as has been given always to the various State commissions?

The CHAIRMAN. Well, now, so far as the State commissions are concerned I have always stated my view as to that. We do not intend to make any change as compared with the Shreveport principle, save one of procedure. But so far as the revenue is concerned somebody will have to pay enough to keep the roads running. Whether it is fixed by the States or by the Federal Government, somebody will have to do that or the railroads will quit.

Mr. SHAUGHNESSY. Yes; there is no disposition on the part of State authorities to refuse adequate earning returns. Arizona, Mr. Chairman, is in the same relative situation as Nevada is in.

The CHAIRMAN. That seems to be the condition all over the country.

Mr. SHAUGHNESSY. The carriers appeared before the Arizona commission and failed or refused to put in any evidence upon which the States commission could make an intelligent decision or order, and therefore they refused to grant the application of the carriers for this percentage of increase asked by the carriers.

Also, Arizona is in relatively the same situation as Nevada with respect to its mining industry. It needs relief in that respect. Perhaps that is beside the issue, but I just wanted to bring it to your attention.

There are so many questions that are interrelated with rate fixing that I do not know just how to approach the matter. But is there not, Mr. Chairman, a large excess in the capacity of the railway plant? I think there has been an excess for some years. The point I have in mind is whether or not we should for the future require the users of the transportation facilities to carry all of that burden, and to carry it in preparation for war necessities, or whether some of that burden should not be carried by property at large, which it is designed to protect in case of war or other emergency. That is a question of policy, and it is also a question of rate fixing.

The CHAIRMAN. Of course that is true, but if we have to carry the facilities that are intended only for war it is quite apparent that those who pay the freight should not be compelled to bear that burden. But the constant complaint before this committee has been that there was a shortage in facilities in peace times for moving the ordinary commerce of the country. I have gone over that subject pretty carefully, and the outcome of my investigation is that at times there is a shortage and at times there is an over supply. It has been less than a year

and a half since the people were complaining bitterly because the roads could not furnish the cars that were necessary to move their products. This was long after the war ended. We have had extended hearings where the complaint was all the time that the railroads ought to be compelled to buy more locomotives and more cars and build more tracks and elevators, etc., in order to do the ordinary business of the country. I do not believe that we ought at this time to enter into an investigation as to the facilities. That is a widely disputed question.

(The opinion and order of the Public Service Commission of Nevada is not included in the record, but a copy is on file with the committee.

(Whereupon, at 3.30 o'clock p. m., the committee adjourned to meet at 9.30 o'clock a. m. to-morrow, Saturday, October 29, 1921.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

SATURDAY, OCTOBER 29, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in the committee room in the Capitol Building, Senator Albert B. Cummins (chairman), presiding.

The CHAIRMAN. The hearing will be resumed.

Mr. BENTON. Mr. Chairman, you will remember that when the session adjourned on yesterday Chairman Shaughnessy, of the Nevada commission, was speaking about the Shreveport power of the Interstate Commerce Commission, and expressed the idea that the matter could best be dealt with by an absolute repeal of any Shreveport power in the hands of that commission; I mean the Interstate Commerce Commission. You suggested at that time that he was the first man who had indicated any view of that kind. Judge Burr, of the Florida commission, in view of the understanding which you seem to have of the situation, wants to say something about that particular matter if he may have the opportunity to do so.

The CHAIRMAN. Very well, the committee will hear Mr. Burr.

STATEMENT OF HON. R. HUDSON BURR—Resumed.

Mr. BURR. Mr. Chairman, I will take but a few moments. First, owing to the close of the hearing before I had finished the few remarks I wanted to make I want to say that in the Florida case which I outlined to the committee, what I had to say was somewhat in criticism of the Interstate Commerce Commission, and I intended to say and want to say now in justice to Commissioner Eastman, he dissented in that case. I intended to say that on yesterday and think I ought to say it now.

And I want to make, after thinking about it, a further answer—or I might say an amended answer—to the questions asked me by Senator Kellogg on yesterday on the Shreveport doctrine, and it is this: That I am in favor of the so-called Shreveport principle if in each case the Interstate Commerce Commission enters into a thorough hearing and investigation of both the interstate rate as to its justness and reasonableness, and the State rates as to their justness and reasonableness, and lets whichever rate is found to be unjust and unreasonable fall, whether it be the State rate or the interstate rate. But if that course is not to be followed I want to go on record as being opposed to the whole principle.

The CHAIRMAN. That is, the whole principle of the Shreveport position.

Mr. BURR. Yes, sir; because it is unfair to each State that on a mere allegation of some shipper or some railroad that the State rate is too low and constitutes a burden on interstate commerce to say that goes far enough. It may be that these State rates are just and reasonable, and if a proper investigation is made of both, then they can determine which must fall. I can not assert it as a fact, but I believe even in the original Shreveport case the decision should have been that the interstate rates should have been altered instead of the State rates in Texas.

The CHAIRMAN. Do you believe that a rate which upon investigation of the rate and its effect upon interstate commerce is held to be discriminatory, the conclusion does not inevitably follow that either the State rate or the interstate rate must be changed?

Mr. BURR. I agree that there must be harmony there, but it does not follow because somebody alleges a State rate is unjust and unreasonable that it is a fact. And if it is found upon investigation and the presentation of proper evidence that it is a just and reasonable rate, and then that rate is raised to meet the objection in the complaint as to interstate commerce because that rate is unjust and unreasonable to the public, although the State rate was reasonable before, of course, it must be unjust to the public if raised.

The CHAIRMAN. Is it possible that a system of rates, and I am speaking of an interstate rate that is compared with a State rate and which is found to discriminate against interstate commerce, that the two rates can be considered without reference to that discrimination? What I mean is this: If the discrimination exists it must be removed. Now, either the State rate is wrong under those circumstances or the interstate rate is wrong. I can easily conceive that in such cases it might be that it was the interstate rate that should be changed rather than the State rate, but both of them can not continue, I think, under the law if discrimination is found to exist.

Mr. BURR. Well, sir; all I want to say is that the law should be so administered, and I think it should be so clear that it will become the duty of the regulatory body to ascertain which one of those rates should fall.

The CHAIRMAN. I quite agree with you on that.

Mr. BURR. But the proposition heretofore has been, and you take it in all these State cases, that have arisen in the last year I think, with only one or two exceptions the decisions have been without going into the reasonableness of interstate rates as against State rates.

The CHAIRMAN. I do not understand the Shreveport case in just that way.

Mr. BURR. For instance, there is this about it: A railroad company can create a Shreveport situation any time it pleases. It can go to work across the border of a State and file a tariff which by its figures becomes such that an allegation can be made the next week after it goes into effect that the State rate is too low, and they can raise the rate on the border of your State.

Mr. BENTON. And it does not make any difference whether traffic moves under it or not.

Mr. BURR. Yes; as Mr. Benton has suggested, it does not make any difference whether traffic moves under it or not. Take a case like the Florida case——

The CHAIRMAN (interposing). The Shreveport case would not involve any such result as that, in my opinion, if properly applied.

Mr. BURR. I believe that the question of discrimination in the so-called Shreveport situations ought to be confined to complaints filed by persons and places and not by carriers.

The CHAIRMAN. That is a debatable question; I agree to that, as to whether a carrier should have the opportunity to complain.

Mr. BURR. I do not know whether I have expressed myself as clearly as I would have liked, but that is what I would like to say as an amendatory answer to the questions I answered on yesterday.

On the same question, the other day when we were in convention at Atlanta, and this question was under consideration, there was a resolution offered the purpose of which was to absolutely do away with the so-called Shreveport doctrine. There was some debate upon it and a few of the members said they were in favor of the resolution as a whole but did not want to go to the whole extent of condemning the Shreveport principle. Finally, after some debate on the question, the resolution was referred back to the committee that had been considering it for months and had drafted the resolution, without instructions, and that committee did redraft the resolution in the form in which Mr. Benton has introduced it here.

The committee brought back both resolutions, the original and the redrafted resolution. They did not offer one as a substitute for the other, but brought both back. A vote was finally taken on the amended resolution and none on the other. I merely mention this in order to say to you that there was an overwhelming sentiment in that convention to absolutely do away with the Shreveport principle; and had the question gone to a vote I feel confident in my own mind about the result, because I circulated very actively among the membership present trying to get the sentiment, and I believe there would not have been over 6 or 8 votes in that convention against the original resolution. Whether I am wrong about that or not I am confident of this, and I think Mr. Benton will confirm my statement, that it would have passed by an overwhelming majority. So that there is sentiment, and it is not wholly in the minds or railroad commissioners who were voting on that resolution, because they are in touch with the sentiment of the people in their respective States, and that is where they get it from.

I think that concludes the point I wanted to touch upon, Mr. Benton.

Mr. BENTON. I thank you, Mr. Chairman, for permitting me to give way to Mr. Burr. Shall I resume, Mr. Chairman?

The CHAIRMAN. Inasmuch as you are discussing the whole subject it shall be for you to say whether we will go on at this time or not.

Mr. BENTON. Mr. Chairman, I am estirely subject to the direction of the committee and am ready to go on at any time. Of course, it would be a matter of great satisfaction if I might call the attention of other members of the committee to certain cases

which have been before the Interstate Commerce Commission and which present particular phases which I would like them really to know about; I realize we are making a large record here, which can be referred to by anybody who has abundant time and inclination to look into the subject. At the same time, all these matters are so exceedingly important to the States involved I wish it were possible to call them to the personal attention of Senators in a way that would be easy for them to understand in our presentation of the case, and that they might ask any questions which occur to them. And yet I realize their engagements are such as to preclude the possibility of their being present all the time, and I shall avail myself of the opportunity which has been given to make the record here in the way that they want it made.

The CHAIRMAN. It is possible some other members of the committee will be here presently, and unless you object to it you may go on, trusting that your general views may either be read by other members of the committee or that Senator Fernald and myself will be able to make them understand what your views are.

Mr. BENTON. Very well, Mr. Chairman.

STATEMENT OF JOHN E. BENTON—Resumed.

THE ILLINOIS CASE.

Mr. BENTON. Mr. Slater has been before the committee and has told you gentlemen very graphically the Illinois situation. The Illinois case is one of the very early cases before the Interstate Commerce Commission. The passenger end of it was argued together with the New York case; the freight end of it was argued somewhat later. That case is reported in 59 I. C. C., 350, and in 60 I. C. C., 92.

Mr. Slater has explained to you the incongruous situation produced by the division of the State of Illinois into three districts, with the result that the increases were, respectively, 40 per cent, 25 per cent, and 35 per cent, with an intergroup increase of 33⅓ per cent, making four different interstate increases which the State was subject to; and, as he told you, the State itself was compelled to suffer an intrastate advance of 40 per cent throughout the State.

I refer to it merely for the purpose of being sure that you get clearly into your minds that this resulted in an increase of 40 per cent on intrastate movements on the very lines, in some cases, on which a 25 per cent increase was made in interstate rates. That result was brought about by the orders of one body—the Interstate Commerce Commission.

Senator FERNALD. Mr. Benton, let me make an inquiry right there: What has been the practice of the different commissions in the different States relative to other matters, outside of rate making, with reference to the railroads? Have you considered any other expenses, in regard to operation of trains, like labor matters, or anything outside the rate regulation? Had that been the custom?

Mr. BENTON. Uniformly and without exception in every case where the rates were regulated the roads had the same sort of opportunity to go into their operating expenses of all kinds, including their interstate obligations if they desired to offer testimony on that score, that they have before the Interstate Commerce Commission.

Senator FERNALD. And that was universal?

Mr. BENTON. That was universal. The rate-making power of the several commissions has been, to the extent that it went, as full and complete as the jurisdiction of the Interstate Commerce Commission. There were some States, as I have explained, that had not been granted passenger fare jurisdiction and did not attempt to make passenger rates. But in every case the carriers had the same opportunity to present evidence that they had before the Interstate Commerce Commission.

The CHAIRMAN. This may be said in that connection: I do not know of any State that gave its commission authority to control the expenses, such as wages and the like.

Mr. BENTON. That is true; and, of course, the Interstate Commerce Commission does not have that power.

Senator FERNALD. It does not have it, of course, now that the Railroad Labor Board has it; but it formerly had some jurisdiction along that line, did it not?

Mr. BENTON. It never had any jurisdiction over wages.

The CHAIRMAN. It has jurisdiction to eliminate as expenses those expenditures which in its judgment are not fair, honest, and efficient?

Mr. BENTON. And so does every State commission.

The CHAIRMAN. Yes; but what I mean is, no State commission has any such power as we gave to the Labor Board?

Mr. BENTON. You are right, Senator, of course. The only exception which at any time could be made with respect to that was in Kansas, where the industrial court

had jurisdiction both over wages and rates. And there the attempt has been abandoned, and control over wages has been left in the industrial court, and the public utilities commission has been reestablished with control over rates. They are independent boards, just as the Interstate Commerce Commission and the Labor Board are.

In Illinois the only rates which the Federal commission did not prescribe were commutation rates, and they are now making an investigation through one of their examiners. In due time it may be expected that the examiner will make a report to the commission, and that it will be adopted and put out in the form of a Federal order.

It may be that through employment by a department here in Washington a nonresident of Illinois may become able to make a wiser decision as to what local commutation rates about Chicago ought to be than the duly elected officials of Illinois, who live in that State and know conditions there, but I can not refrain from suggesting that the substitution of such control over the subject matter represents a wide departure from the governmental policy which in the past we have been accustomed to in this country.

I come now to the Wisconsin, Arkansas, Minnesota, Iowa, Montana, Ohio, and Michigan cases.

In these cases, reported, respectively, in 59 I. C. C., 391; 59 I. C. C., 471; 59 I. C. C., 502; 60 I. C. C., 55; 60 I. C. C., 61; 60 I. C. C., 78; and 60 I. C. C., 245, the Federal commission made orders similar to the order entered in the New York case prescribing a 20 per cent advance in passenger rates.

The CHAIRMAN. There is this difference between passenger fare cases in those States which you have mentioned as compared with New York. So far as Iowa is concerned, and I think it is true of every other State you have mentioned, the State commission has no power over passenger rates that have been fixed by statute.

Mr. BENTON. I thank you for mentioning that. I did not mean to say that the local law was the same. I meant to say that the Interstate Commerce Commission proceeded in the same way in those cases and made the same sort of order—one setting aside the entire body of State rates, which, according to the terms of the order itself, the commission saw fit to make permanent, that is, until a further order of the commission. It locked those rates in those States up so that they were beyond the control of either the local commission or the Federal commission itself; and I meant to say that they did that without consideration of the rates that they raised, applying a straight percentage of increase without finding whether the fares they raised were high enough already or not.

Some special mention may be made of the Iowa case. That was argued before the Federal commission very shortly before the Iowa Legislature convened. Counsel for the State of Iowa pointed out that there was no reason to believe that Federal power must be exerted to compel the allowance of just rates of fare in Iowa.

And I may say that Iowa has a State official known as commerce counsel, as the chairman of this committee will know, who is responsible not to the State commission but who is a State officer. He came here and pointed out the fact which I just mentioned.

It was suggested that Hon. John A. Guiher, of the Iowa commission, had been one of the men who had participated in the Ex parte 74 hearing, before the Federal commission, and that the Iowa commission had very promptly granted the freight advances and had refrained from acting with respect to passenger rates, because it had no jurisdiction over such rates. He asked the Interstate Commerce Commission not to destroy the power of Iowa over passenger rates, at least until the legislature should have had a reasonable length of time within which to act, by statute, as to such passenger rate, or to commit control of over the same to the State commission. In its report, handed down just after the legislative session began, the Federal commission did not refer to the request in any way but made an order as already stated.

In the Arkansas case the Federal commission held, in substance, that it was optional with carriers, desiring to raise intrastate rates, whether they would apply to the State authorities to make the desired advance, or would apply directly to the Federal commission. This, of course, had been decided by implication in the New York case, but the ruling was first clearly stated in the Arkansas case.

In each of these cases, it will be noted, because the legislature did not happen to have committed the power of legislation as to passenger rates to the local commission, it was punished by having its legislative power taken away, by an order of the character which I have mentioned.

The same sort of order was made in South Carolina and also in North Carolina.

SOUTH CAROLINA AND NORTH CAROLINA CASES.

These cases, reported, respectively, 60 I. C. C., 290, and 60 I. C. C., 362, I speak of separately only to show the extent to which the Federal commission has been carried under its interpretation of the existing law. In each of the cases State-wide orders were made advancing passenger rates, of the same character as that made in the New York case. It is, however, to other features of the order that I desire specially to refer.

By State statute in South Carolina, where the distance traveled is so short that the mileage rate in effect would be less than 5 cents, the minimum fare is made 5 cents. In all other cases the established fare applies. From interstate passengers, however, the carriers were permitted—without the matter ever having been passed upon, so far as I am aware, by the Interstate Commerce Commission—to collect a minimum fare of 10 cents prior to Ex parte 74, and after the Ex parte 74 decision this was increased 20 per cent, making 12 cents as a minimum fare.

The CHAIRMAN. I can hardly conceive that there would be any travel under an interstate rate as short as 12 miles.

Mr. BENTON. As short as 3 or 4 miles would give the 12-cent rate. There would be few instances—if there were any I do not know where. I assume that there were some; but they were so few that they would be inconsequential.

When the carriers complained of the passenger fares, of the 5-cent minimum fixed by the South Carolina statute, they asked the Federal commission to advance the minimum within the State to 12 cents, and the Interstate Commerce Commission did it, saying:

"While in this instance the intrastate minimum charge apparently has no very substantial effect upon the revenue of any one carrier, yet if the same charge were established throughout the southern group, and if similar discriminations were permitted in other minor rates, fares, and charges, the effect upon revenues might become considerable. It is clear that the question whether the intrastate charge is unjustly discriminatory against interstate commerce does not depend upon the amount of revenue involved."

I call attention to the fact that they recognized they were not in any position to pass upon the justice of it, and they did not find it was just, but they found that the record did not prove it was unjust, so they required it to be put into effect intrastate in contravention of the South Carolina statute.

Senator POINDEXTER. Who wrote that opinion?

Mr. BENTON. That was put out by the commission, not under the name of any particular man.

The carriers in South Carolina also collected from interstate passengers boarding any train without tickets a cash penalty charge of 15 cents, without rebate. This was increased to 18 cents after the Ex parte 74. The South Carolina statute forbade any such penalty charge. Upon the carriers' petition the Federal commission ordered the imposition of a 15-cent penalty charge for intrastate traffic, without rebate. The reasoning upon which it made this order was stated in the commission's report as follows:

"The conductor's penalty charge is not levied for direct revenue purposes, but to facilitate the efficient handling of traffic and the collection of fares, and it was not our intent in Ex parte 74, although the language used may give color to the claim, to authorize an increase in charges of this character. We think, therefore, that the increase in the conductor's penalty charge from 15 cents to 18 cents has not been justified, but upon this record we are not prepared to find that 15 cents is an unreasonable amount. It is also our opinion that the absence of such a charge for intrastate application in South Carolina can hardly fail to have a prejudicial effect, not only upon intrastate but upon interstate passenger traffic as well, and that it is unjustly discriminatory against interstate commerce. Our conclusion as to the amount is without prejudice to any further consideration of the charge in the future upon a more comprehensive record."

It may be proper for me to mention that in the New York case, when the commission for the first time frankly entered the field of local regulation and displaced the State, it attempted to lay down a rule which should justify its action and perhaps serve as a restraint upon itself thereafter. It said:

"Inasmuch as the basis of our jurisdiction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate commerce. It is no answer to this to say that if this conclusion be admitted it may have the effect of completely displacing State jurisdiction over State commerce. There may be cases in which intrastate rates affect interstate commerce injuriously in ways so manifest as to make them subject to our control.

There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disregard it. But in every case which puts in question intrastate rates the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent. If they do, they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a State should be involved."

The New York decision was made November 13, 1920. The South Carolina decision was made January 28, 1921. In that space of time the Federal commission had become more accustomed to the exercise of its new power, and also prepared to indulge a passion for uniformity which is not uncommon to Federal boards. It had taken possession of the State field in the New York case avowedly to protect the revenues of carriers, and it had said there that the test of its right to do so in a given case was the extent of the injury shown to result from the difference in rates complained of. Within three months it had reached a point where it was prepared to set aside State statutes applicable to charges not designed for revenue purposes, and admittedly of slight consequence in their effect upon carriers' revenues, and was ready to say that the existence of unjust discrimination, giving the Federal commission jurisdiction, did not depend upon the amount of revenue involved.

These two charges, inflicted upon the people of South Carolina by Federal authority, were admittedly of no great consequence so far as the aggregate amount of money is concerned. This the Federal commission says, and this we admit. But they are charges which are irritating to the people of that State. The Legislature of South Carolina has not seen fit to delegate to the railroads of that State power to fine a man who may for any reason be unable to procure his ticket before boarding a train.

And I want to say in that connection that it appeared before the Federal commission and was argued by the chairman of the South Carolina commission in that case, that under the conditions existing locally in South Carolina a charge which might, perhaps, be just somewhere else was unjust there because the carriers did not make provision by the employment of clerks so that people within a reasonable time before the departure of trains could procure tickets, and they were even compelled against their will to get on trains for passage without having purchased tickets, and for that reason he protested in the name of South Carolina against the setting aside of the South Carolina statute and the imposition of a 15-cent or 18-cent penalty charge, as then proposed, upon people who happened to be upon trains without tickets.

The legislature has also expressed its judgment that the general mileage rate in effect should apply in all cases except where the fare produced would be less than 5 cents, in which cases 5 cents should be the fare. The Federal commission has now stepped into South Carolina, at the request of the carriers, and has compelled the payment of 27 cents, instead of 5 cents, by the man who rides half a mile without having bought his ticket in advance. I say this has been done at the request of the carriers, because in my section of the country if a man fails to purchase a ticket he is required to pay 10 cents more than the regular fare, but he is given a rebate check upon presentation of which at any ticket office he can be repaid that 10 cents. The commission knows this, but it does not exercise its power to compel any change in the practice in my section of the country, although the carriers in New England need revenue perhaps worse than in any other section.

I waive any discussion of the question whether the 5 cents prescribed by the State of South Carolina for that half mile is or is not a more just rate than the 27 cents that is now prescribed under the order by the Federal Government. I point out the absurdity of the ground on which the carriers asked the Federal commission to act, and upon which the order of the commission must rest—that is, that the lower State charges put the man living outside South Carolina, and desiring to do business in that State, at a disadvantage, as compared with the man living in South Carolina was so serious that the Federal commission ought to find it unjust, undue, and unreasonable, and ought to bring into play the exercise of the power of the National Government to set aside local regulations made by the people of South Carolina to apply to their purely internal traffic.

Senator FERNALD. Mr. Benton, right there let me inquire: While in this particular instance it appears to be a great hardship to the citizens of South Carolina, do you know of any cases on record in any States where it has also been a hardship to the carriers and their revenue was less by reason of the increase?

Mr. BENTON. I have not any data in the way of compiled figures which I could present to the committee on that subject. I have expressed my opinion, early in the hearings, and have shown that in different States, where freight rates have been locked up, the carriers have joined with shippers in attempting to discover a way of escape from the locked-up rates.

Since I touched on that matter before the committee the other day an order of the Interstate Commerce Commission has come to my attention which shows that another method of procedure whereby the carriers and the public may escape from the effect of this cast-iron order has been discovered. It is a case that arose in the State of Texas, where the rates, as you will remember, have been permitted to be advanced by the State commission 33⅓ per cent, and the Interstate Commerce Commission came in and held an investigation and found that they were unjustly injuring interstate commerce and ordered them up to 35 per cent—just a difference of 1⅔ per cent. But it locked up every freight rate in Texas. A case arose where the parties wanted to ship gravel and they could not do it under the State rate because there was another rate that was discriminatory, which gave unfair advantage to another community. Both of the rates were subject to the jurisdiction of the State of Texas, but for the fact that they had been frozen up by the Federal commission's order.

Senator STANLEY. Let me ask you a question right there: What concern was it of the Interstate Commerce Commission whether one community within the State was discriminated against in favor of another community within the State if the traffic to both communities was intrastate?

Mr. BENTON. They had never heard of those rates, Senator. Those rates had been frozen up with all the other rates in the State by a blanket advance of 35 per cent without looking at the particular rates.

Now, they were frozen up. The Texas commission heard the parties and it could not enter an order. It knew what it wanted to do but it was obliged to file a formal petition to the Interstate Commerce Commission, and it carried through that petition, and the action of the Federal commission finally took the form of an order that excluded from the effect of its order those two rates and left them subject to the jurisdiction of the State commission. Now, the State commission after all that procedure can go ahead and make the change in the rates which will permit the internal commerce of Texas to move.

That shows that the Interstate Commerce Commission—whatever it may be disposed to say, and I believe it will be disposed to come here and frankly admit it—recognizes the hardship that is imposed by these State-wide orders. The Interstate Commerce Commission, I want to say, and it would be assumed if I did not say it, is not actuated in what it does by a desire to injure the people of the several States. But it has entered upon a mistaken policy in attempting to administer this act, and in my judgment it has gone very far wrong, but it is due these gentlemen for me to say that I have the highest regard for them collectively and individually. They are hard-working, conscientious, overburdened men, put to a task that no body of men that could be gathered together in the United States can perform satisfactorily. They are not infallible. With respect to their attempt to assume and exercise jurisdiction over the rates of the States they have made a serious mistake, in my judgment, but I want to say that I do not question the motives of the men upon that commission.

Senator STANLEY. I share your high opinion of the Interstate Commerce Commission. It has done good work, and it is the most successful commission, and the only successful one that I know anything about, that the Government has ever organized to do any great work. But without regard to any good faith of the commission, which I do not question, my inquiry is this: Has the Interstate Commerce Commission, according to your contention, any concern as a commission, without regard to the excellence of its members, with a differential or discrimination between two communities both of which do strictly intrastate business? I want to get your viewpoint on that.

Mr. BENTON. Senator Stanley, in my judgment they have not. In my judgment the Congress never intended them to have anything to do with intrastate rates, except only to the extent that it may be necessary to abate discriminations which unduly injure interstate commerce and which show their effect upon persons and localities. But the Interstate Commerce Commission has construed section 15 (a) of this act as giving them responsibility for creating revenues, and from the beginning of their administration of the act until the last opinion they handed down they have shown that they were acting under the belief that the Congress had commanded them to do that thing. And that is the reason and not because they have any desire to injure the people of the State of Florida that in the Florida case, as Judge Burr told you on yesterday, they actually compelled the East Coast Railroad in Florida, and other railroads that were entirely satisfied with the rates prescribed by the State of Florida, to increase those rates. I suggest that such a proceeding is unheard of before in governmental regulation in this or any other country, and it arises purely by reason of the presence in the act of section 15 (a).

The CHAIRMAN. I wish you would point out somewhere the language in the decision in Ex parte 74, or in any other proceeding before the Interstate Commerce Com-

mission upon an application to increase State rates, which indicates that the commission looked upon section 15 (a) as a command to increase State rates without respect to discrimination.

Mr. BENTON. That can not be done because the Interstate Commerce Commission takes the words "discrimination against interstate commerce" which the transportation act contains in section 13, and takes the command to produce 5½ per cent or 6 per cent on the aggregate value of the property which the Congress put into section 15 (a), and says that the effect of that command would compel them, should there be a shortage in appropriate revenues from intrastate business, to make it up from interstate business, and that is "unjust discrimination against interstate commerce." So that the thing in all the discussions of the commission touching the subject is tied up with that idea of discrimination. If the Senator asks me to point out language where the order is not based upon the idea of discrimination, I can not do it; it is based upon that false idea which arises from the interpretation they place upon section 15 (a).

The CHAIRMAN. Then I want you to specifically call attention to whatever language they use with respect to the construction of section 15 (a) which indicates that conclusion.

Mr. BENTON. I should be very glad to do that, Senator. I am not prepared to do that now. I would like to do it consecutively, and in an orderly way so that it may be as helpful to you as possible. If I may I would like to get the decisions, which have not here at hand, and examine them and present them later.

The CHAIRMAN. Very well. I would like to have you do that. I agree with all you say with regard to the high motives which actuate the Interstate Commerce Commission. But the fundamental error that has been made, from my standpoint, if your statements of fact are sustained is in accepting the fact that the State rates are lower than the rates which had been issued by the commission on interstate rates as conclusive evidence of discrimination, and of course that results in these frozen situations, of which you speak, and I do not believe that any member of the committee or any Member of Congress ever intended to do anything of that kind. I never dreamed that the Interstate Commerce Commission would declare a rate discriminatory as against interstate commerce, unless it had investigated that particular rate and the traffic which moved under it and found that it did unjustly and unreasonably work to the disadvantage of the people outside the State who were doing this same kind of business. That was our idea, I am sure. Now, this blanketing the whole country with a uniform advance in State rates, that is by groups, is the thing that has done all this harm.

Senator STANLEY. It appears from what the judge says that the Interstate Commerce Commission seems to have been impressed with the idea that a duty was imposed upon them to so arrange rates as to provide this 6 per cent return. And I agree with the chairman that there was no such intention upon the part of the framers of the law.

The CHAIRMAN. There was no such intention, and there is nothing in the act that could lead any reasonable person to any such conclusion as that. If they have done that, then, as far as I am concerned, why the quicker it is undone the better it will be for the country.

Mr. BENTON. Mr. Chairman, those are very sweet words to my ears, and the echo of them will be most welcome in the different States of this country.

Senator POINDEXTER. Let me ask you one question on the general principle of this question you are discussing. Suppose just for a hypothetical case, and stated in an extreme form, that all the State commissions fixed intrastate rates on a confiscatory basis, what would you say then as to the power of the Interstate Commerce Commission to readjust them?

Mr. BENTON. It has not got any power to readjust a rate merely upon the basis of revenue, because Congress never gave it that power. Whether Congress has the constitutional power to do that or not, there is no necessity for it, because the carriers have not failed in any State to get a temporary injunction from the courts if they wanted to obtain a temporary injunction against a rate which they alleged to be confiscatory.

Senator POINDEXTER. You are getting back to the actual situation, in which I entirely agree with you, as has been stated here. It is perfectly absurd, in my opinion, that the commission should charge rates that they had never investigated for the purpose of finding out whether they were reasonable or unreasonable, or what relation they actually had to interstate business in their effect. But I am speaking about the fundamental question.

Mr. BENTON. The question of policy.

Senator POINDEXTER. The question of jurisdiction and power to regulate when such cases arise, and I want to get your opinion as to whether or not the fixing of

rates by the State on a confiscatory or an unreasonable basis would be a discrimination against interstate commerce in that it would place an extraordinary burden upon interstate business to raise essential revenues to operate the road?

Mr. BENTON. Are you meaning to ask whether, in my opinion, the Federal Government has the power to assume jurisdiction over that, or whether the Federal power ought to do it?

Senator POINDEXTER. I am asking you whether the Federal Government has the power to assume jurisdiction, and also whether, in your opinion, the Interstate Commerce Commission has that authority under the present law.

Mr. BENTON. In my opinion the Interstate Commerce Commission has not that authority under the present law and will not have it unless there is an extension of the meaning of the act by judicial construction, such as was made in the Shreveport case. As I indicated the other day, when Congress passed the act to regulate commerce it said that it should not apply to transportation "wholly within one State"—words that are clear of meaning to the ordinary man. Yet after those words had been construed by the Supreme Court it was found that transportation from A to B, both points being in one State, was not transportation "wholly within one State."

Now, if there is anything that would appear to be clear—both from the language which you used, from the history of the act, and from the declaration of both chairmen made when the bill was reported, and from the declarations of Senators, members of this committee, made during this hearing—it is that there was no jurisdiction intended by Congress to be granted in the transportation act to the Interstate Commerce Commission to hold to be discriminatory a rate merely because the Interstate Commerce Commission did not think it was as high as it ought to be. But when the Federal courts throughout the country, in 20 States or thereabouts, have sustained orders made upon that theory, when an order made upon that theory in the Wisconsin case under challenge in the United States Supreme Court was argued in March of this year and has been held under consideration ever since, and when the court has ordered a reargument on that question in December, it would take a rash man to say with any degree of assurance that there may not be a construction placed upon the language which you put into the transportation act which will very greatly surprise you and surprise the rest of Congress and which will make that act accomplish something which Congress never designed to have it accomplish.

Senator POINDEXTER. Well, now, what particular language do you refer to?

Mr. BENTON. I am referring to the words which you put into the section 13 authorizing the carriers to institute a proceeding for the purpose of setting aside State-made rates upon the ground that they were discriminatory, the words which you put into that same section forbidding discrimination against interstate commerce additional to discrimination against persons and places, and to the provisions of section 15 (a) which, by the commission and by certain courts in decisions—which I will later put into the record—have been hitched up with those changes in section 13.

Senator STANLEY. Let me ask you one other question, Judge, to get this idea clearly in mind. Take the hypothetical case of a railroad both of whose termini are within a State, engaged entirely in intrastate commerce. Is it your opinion that Congress is warranted under the Constitution in vesting in the Interstate Commerce Commission authority over that road whatsoever, or its traffic?

Mr. BENTON. I argued that it is not warranted under the Constitution in regulating any traffic over that road, except that which is interstate. Of course a road which is a State road may be engaged in transporting shipments interstate.

Is it desired that I continue with my statement, Mr. Chairman?

The CHAIRMAN. Well, we are going to have a short executive session. The Vice President will be here, so I will not have to leave to open the Senate, and you can continue for a while. We will go on for 10 minutes yet.

Mr. BENTON. I think in that time I can just about finish my reference to the South Carolina case.

I was pointing out the absurdity of the finding by the Interstate Commerce Commission that a minimum fare provision in South Carolina, or a provision by statute in South Carolina, that a conductor's penalty charge should not be assessed on the man who happened to get on the train, constituted an "unjust and undue discrimination against interstate commerce."

Now, it is perfectly obvious that when men go into South Carolina from other States their trips are not likely to be less than 3 miles in length, and hence they will not be troubled with the question of minimum fare, and I submit also that the payment of the conductor's cash penalty charge is accidental and occasional, and can not by any possibility constitute such a disadvantage to persons traveling interstate as to prevent their competition on reasonable terms with persons living in South Carolina. Nothing could be more absurd than a finding that the existence of such a charge applicable to

interstate traffic, when the same charge is not in effect in South Carolina, operates to—and now I quote language from the Supreme Court—"obstruct the freedom of movement of interstate traffic," so that the setting aside of the South Carolina statutes is necessary "to keep the highways of interstate commerce open to interstate traffic," which is the ground upon which the power of the Federal Government to control State rates was rested by the United States Supreme Court in the Shreveport case.

Now, I may seem to have taken more time in the discussion of this South Carolina case than the importance of it would seem to warrant. I believe, however, that this is not true, because it is important that you should understand to what length the Federal commission considers that it should push its jurisdiction. I have desired to point out also that whenever the jurisdiction of the Federal commission depends upon a finding of discrimination, that finding will be made when it desires to exercise such jurisdiction upon the most trivial evidence. It is well that you should have your attention called, as forcibly as may be, to concrete evidence that the power of the States to regulate their internal commerce can be preserved in any part only by the explicit withdrawal of all power from the Federal commission under the so-called Shreveport rule, or by clearly defining the class of cases in which such power may be exercised, and the character of proof which must be presented to show the needs for the exercise of that power.

At a later time in the hearing, if I am permitted to do so, I am going to discuss what amendments Congress will have to make to cure this situation. There is one point upon which every State commissioner that I have talked with is in accord with all the other State commissioners, one point that I believe there can not be any reasonable doubt about on the part of anybody who will study the opinions of the Interstate Commerce Commission that have been handed down in these State cases, and that is that an amendment to the act which merely makes clear that Congress did not intend to extend the Interstate Commerce Commission's power by the passage of the transportation act, will not cure the situation.

It is necessary to go further than that, or we are going to have the same kind of orders and be plagued with the same sort of difficulties and the same mass of litigation which we are engaged in now. For this reason, that now whether the Interstate Commerce Commission can step into a State and make an order striking down its rates depends upon whether the Interstate Commerce Commission says: "We find that these rates are discriminatory," and there is nothing laid down in the statute which defines discrimination, and the Interstate Commerce Commission in its reports has made it clear that it now claims that it could make the kind of orders it has made without the additional language in the transportation act, at least so far as the provisions of section 15 (a) are concerned.

I am going to point out in a case that I want to refer to at some length later in my statement, where, in the case involving passenger fares on an electric railroad fixed by franchise in certain places in Ohio, notwithstanding the fact that section 15 (a) provides that the same shall not apply to carriers of that class, the Interstate Commerce Commission has made an order prescribing intrastate rates and has shown by its discussion that it was doing so because it judged the rates fixed by the franchises to be too low. So that if Congress does not like the sort of orders that the Interstate Commerce Commission is now making, and intends to cure the situation, it will have to go much further than merely to make it clear that it did not intend to extend the power of the Interstate Commerce Commission—it must end the power of the Interstate Commerce Commission to affect intrastate rates, or it must say: "This is what we mean by discrimination, and this is the kind of proof which shall be presented to you to prove discrimination, and you shall find the facts upon which you base your conclusion that discrimination exists and state them in your report." That is the kind of legislation that is asked for in the resolution that is presented to you, and it is to show the necessity of that kind of legislation that I present the cases where the Interstate Commerce Commission, upon the mere fact of a minimum-fare statute or the failure to permit a conductor's penalty charge, finds that interstate commerce is unjustly discriminated against.

The CHAIRMAN. We will have to suspend the further hearing until Monday at half past 9 o'clock. There is no use of trying to get any members together this afternoon.

Senator STANLEY. Before we close, Mr. Chairman, I would like to ask a question. Mr. Benton, at that point I want to ask this question, because I want to think it over. Is it necessary for Congress to say anything more in order to cure this evil, than that the Interstate Commerce Commission's power over an intrastate rate is predicated upon the fact that the traffic is an integral part of interstate commerce, or that it is by necessary implication indissolubly associated with it?

Mr. BENTON. Do you want me to answer that now or later, Senator?

Senator STANLEY. Yes; you can answer it now.

Mr. BENTON. It is necessary, because under the decisions of the United States Supreme Court anything which the Interstate Commerce Commission find as a fact, if there is some evidence before them, no matter how shadowy it may be, if it is some evidence which they were entitled to consider, it is final, and as I pointed out it is indissolubly connected with interstate commerce. If the commission wants to create jurisdiction for itself so that it can strike down the State rate, it finds that it is indissolubly connected with interstate commerce, it does not state the evidence, it does not state the facts.

Senator STANLEY. It would have to be broader than that?

Mr. BENTON. Yes; if you are going to cure it you must say what you intend shall be considered discrimination against interstate commerce, how it shall be proved, and require the commission to state in its reports the facts upon which they base their conclusion.

The CHAIRMAN. We will suspend now and will resume at half past 9 Monday morning in this room.

(Whereupon, at 11 o'clock a. m. the hearing was adjourned until Monday, October 31, 1921, at 9.30 a. m.)

MODIFICATION OF THE TRANSPORTATION ACT, 1920.

MONDAY, OCTOBER 31, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment on Saturday, at 9.30 o'clock a. m., in their hearing room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will come to order. Mr. Benton, we will proceed with your statement.

STATEMENT OF JOHN E. BENTON—Resumed.

Mr. BENTON. Mr. Chairman, I was speaking at the last session about the South Carolina case. The North Carolina case in all substantial particulars was like the South Carolina case, covered passenger fares and certain charges which I need not speak of, but the principle was the same. The reference to the North Carolina case I put into the record the other day. I will now proceed.

THE NORTH CAROLINA CASE.

The order of the Federal Commission in the North Carolina case also imposed upon the people of that State the same minimum passenger charge and conductor's penalty charge as in the case of South Carolina, also in disregard of State statutes.

NEBRASKA AND TEXAS CASES.

I next refer to the Nebraska and Texas cases, reported, respectively, in 60 I. C. C., 305, and 60 I. C. C., 421.

My reason for referring to these cases together is because in each of them the State commissions went carefully into the questions of the value of the railroad property used in their respective States, and reached the conclusion in each case that the rates which they permitted would yield more than 6 per cent upon the value of such properties under a normal movement of traffic.

The Federal commission ruled that the rates in those States, both passenger and freight, should be nevertheless advanced.

In neither State did the commission have statutory authority as to passenger rates, but in each the freight rates were permitted to be so advanced that the revenues of carriers from all business within those States would yield the 6 per cent return required by the transportation act, under the adoption of the 6 per cent in place of 5½ per cent by the Interstate Commerce Commission. In Nebraska the general advance allowed in freight rates was 25 per cent and in Texas 33⅓ per cent. In each instance under the order made by the Federal commission that advance was made 35 per cent. I quote from the report of the Federal commission in the Nebraska case, beginning at page 312:

"According to the computations of the Federal commission, the increases it allowed would yield a return of about 6 per cent on $331,846,206, which was roughly estimated to be the value of the carrier's property in Nebraska devoted to State and interstate commerce. In other words, in limiting the carriers to the increases above stated the Nebraska commission proceeded on the theory that each State could create a rate group of its own in addition to those fixed by us under the act in Ex parte 74. * * * The Nebraska commission seems to be of the opinion that a 35 per cent increase in Nebraska intrastate rates would make them unduly high and require the people of the State to contribute in an unfair proportion to the total revenues of the carriers. That the rates in Nebraska might be made too high can not be proved by data of the kind used by the Nebraska commission in computing valuation. Moreover, if there

are any conditions that justify less than a 35 per cent increase in this section of the West, the conditions are probably not circumscribed by the State's boundary lines, but affect interstate as well as intrastate rates."

In the Texas case I quote from the report of the Federal commission, beginning at page 426:

"We deem it unnecessary for the purposes of this report to enter upon a discussion of the testimony and exhibits dealing with the valuations of railroad properties in Texas and the earnings of the carriers on State traffic. In a proceeding similar to this, increased rates within Illinois (59 I. C. C., 350), it was urged that in prescribing the measure of the increases to be applied to the rates and charges of the carriers throughout the country necessary to yield the return fixed by Congress for the two years beginning March 1, 1920, we had failed to determine the values of the railroad property separately in that and other States. We pointed out therein that Congress had laid upon us the duty of prescribing rates so that in the aggregate they would yield a certain return, as nearly as may be, 'upon the aggregate value of the railroad property of such carriers held for and used in the service of transportation,' and expressed the view that the interstate commerce act required us to determine upon a valuation for the total property of the carriers and not for the property that might be assigned to interstate traffic. We adhere to that view and repeat that in our opinion the manifest intent of Congress was to repose in us full and final authority to provide the revenues found necessary to yield the specified return by considering the entire structure of rates, both State and interstate, and the aggregate value of the railroad property held for and used in the service of transportation without regard to State lines."

What the commission's ruling comes to is nothing more nor less than that under the group plan of rate making prescribed in section 15-a, which Congress is now asked to repeal, the commission may compel the shippers upon roads in one State to pay more than is necessary to yield a fair return on those roads to make up a deficit in desired earnings on other roads in other States.

This proves what we have before asserted, that what the commission has aimed at in the making of these orders has been to produce revenue for the carriers and not to keep the highways of commerce open to interstate traffic on equal terms.

Even if the Congress had clearly granted to the Interstate Commerce Commission power to review State rates on the ground of reasonableness, State lines could not be disregarded. Determination whether intrastate rates are sufficient requires a consideration of the value of the property devoted to intrastate service; no valid finding can otherwise be made. The inconvenience of ascertaining such value can not remove the necessity for its ascertainment.

This point has been clearly decided by the United States Supreme Court. In Smyth *v.* Ames (169 U. S. 466, 541) the question was involved whether rates, prescribed by State authority, were invalid, as in violation of the fourteenth amendment, because confiscatory. The court held that, in determining the sufficiency of the rates so prescribed, the value of the property devoted to intrastate transportation must be the measure. Upon this point the court said:

"In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

The principle thus laid down was reaffirmed in the Minnesota Rate Cases (230 U. S., 352, 435). The same question was involved. It was held that the State's right to prescribe intrastate rates was of such a nature that rates prescribed by the State could

be disregarded as in violation of the fourteenth amendment, only when shown without question to be so low as not to yield a fair return upon the value of the property devoted to intrastate transportation. The court said:

"Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrsatate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth case (Id., O. 541). The reason, as there stated, is that the State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier can not justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business. * * *"

It will be observed that the question involved was one of constitutional limitation upon the power of a State to regulate intrastate rates. It was established by those decisions that the constitutional guaranty against confiscation in the fourteenth amendment entitled the carrier to a consideration of the value of its property devoted to intrastate transportation, and to a fair return upon that value, without regard to its interstate operations and the revenue therefrom. It was likewise determined that the reservation of power to a State, under the tenth amendment, entitled a State to a like consideration of the value of property devoted to intrastate transportation in judging the sufficiency of rates prescribed by it. In other words, the Federal Constitution was held to protect the State in the exercise of its reserved power as fully and effectively as it protected the carrier in its property right.

The question now is whether the Constitution protects from destruction by the Federal Government those rights which were reserved to the States by the tenth amendment as carefully as it protects the property rights of carriers under the fourteenth amendment. That question will be entertained in the United States Senate.

The CHAIRMAN. Let me suggest that we are very familiar with these cases, and I think if you can just refere to them and pass on it will save a good deal of time.

Mr. BENTON. I will be glad to do that. As a matter of fact, Mr. Chairman, I inserted this discussion here because I understood you to have requested me to discuss that branch. I may have misunderstood your request.

The CHAIRMAN. I do not remember that.

Mr. BENTON. Then I prefer to hand this to the reporter so that the remainder which I have marked may be put in as if I had read it in order.

The CHAIRMAN. That may be done. I thought you were going to suggest this morning the changes that you proposed in the act?

Mr. BENTON. No; I think not.

The CHAIRMAN. Perhaps I was wrong about that.

Mr. BENTON. I will say, Mr. Chairman, that while I refrain from further reading from these cases, I do hope that the Senators will not underestimate the degree of reliance which we place upon that phase of the matter. We feel confident that there is not any phase of it which we can refer to which will receive such careful consideration from the Senators, because Senators in a peculiar way represent the several States, standing here to guard the sovereignty of States, and their separate rights under the Constitution. And if I may do so I want to make this suggestion: That if there was ever a time when we ought to hold fast to an observance of the Constitition it is right now. When the world is rocking, and when you look abroad and see that in some States the whole structure has crumbled, and in other States the foundation of the social fabric is cracking and beginning to crumble, and you see that in the whole world the United States is the only great country where we seem to be fairly safe, the suggestion of some folks that constitutional restrictions and discussion of constitutional questions is rather out of date will not I think, be received by Senators with very much tolerance. If our people are pretty well satisfied and pretty immune to Bolshevism and Socialism it is because they are satisfied their rights are pretty safe here. Governmental traditions are things that are pretty valuable in keeping a people attached to government and satisfied.

When they are once shattered, they are pretty hard to build up again. Property is secure here—and the rights to individual liberty and the rights to political liberty—because our people are satisfied that the Constitution protects all alike. Certainly that is a tradition in which the people believe, and they are attached to the Government and are disposed to continue faithful in their allegiance to the Government because they believe these things are protected. One of the things that our people here in this country learned in their childhood in school, and everybody has thought a fact not to be questioned, is that the right of local self-government is a right that can not be taken away.

The CHAIRMAN. We do not intend to invade it. We do not intend to violate the Constitution if we can help it.

Senator KELLOGG. And we have not done it yet, so far as I know.

Mr. BENTON. I want to suggest that you can not shatter one tradition without shattering others. If you shatter the tradition that the Constitution actually protects one class of rights as well as another, you will shake the faith of the public in the inviolability of the entire Constitution, on which our entire social fabric itself rests.

The CHAIRMAN. Senator Kellogg wants to ask you a question there.

Senator KELLOGG. I do not know that I understand your position. I asked the Florida man the other day if he contended that the Congress should change the rule laid down in the Shreveport and Illinois cases. He said no. Now, is it your opinion that that rule should be changed?

The CHAIRMAN. But he came back afterwards and modified his statement in that regard. Mr. Shaughnessy had appeared for the Nevada commission and he challenged the Shreveport case, and after he had done so, the next morning, Judge Burr appeared and said he thought possibly he might be misunderstood in answer to the question you put to him, Senator Kellogg, and that he wanted to challenge it also.

Senator KELLOGG. Do you challenge the Shreveport case?

Mr. BENTON. I challenge the Shreveport doctrine as now administered and applied.

Senator KELLOGG. As applied by the Supreme Court of the United States in the Shreveport and Illinois cases, do you challenge it?

Mr. BENTON. Senator, the constitutional power of the Congress directly or through its agencies fully protects interstate commerce, and it is its duty to protect it against injury. I do not challenge that.

Senator KELLOGG. Do you challenge the doctrine laid down in the Illinois and Shreveport cases?

Mr. BENTON. That is the doctrine laid down in those cases and the doctrine I do not challenge.

Senator KELLOGG. Very well, you do not challenge those decisions, then?

Mr. BENTON. I indicated to you, and upon inquiry must now indicate, that I think the Shreveport decision carried the interstate commerce act beyond anything the Congress ever intended.

Senator KELLOGG. Then you want to say you wish us to enact a law changing the Shreveport and Illinois cases?

Mr. BENTON. Yes. I appear here in support of a resolution which asks the Congress to make clear and definite what it means by discrimination, and so to regulate the procedure in the application of the Shreveport power, if that power is permitted to be exercised hereafter by the Interstate Commerce Commission, that the States may be secure. Under the language of the act as it now stands we believe, and that opinion is the unanimous opinion of the members of the State commissions so far as I know, that that right is not secure even though you repeal the transportation act.

The CHAIRMAN. I will state further in connection with the Shreveport case that the convention at Atlanta originally proposed, or at least some members of it did, a resolution which did directly impeach the Shreveport decision, and Judge Burr says he believes that resolution would have been carried by a very large majority. But for some reason that so far has not been made clear to me that resolution was withdrawn and does not form a part of the memorial which has been presented to us. Have I stated the situation correctly, Mr. Benton?

Mr. BENTON. You have, and maybe I can make clear and maybe I can not just the reason: I agree entirely with Judge Burr's opinion as to what would have happened if a vote had been taken upon the first resolution. The first resolution was the subject of long discussion by the committee on the question of limiting the Shreveport power so that the exercise of State power would be secure if that power were left in the hands of the Interstate Commerce Commission; and the committee reported a resolution asking the Congress to terminate that power. Commissioner Taylor, chairman of the Nebraska commission, took the floor against it. The commissioner said that while his State was suffering, and suffering badly, from the existing state of affairs, he did not himself favor coming to Congress and asking the Congress to terminate that power altogether; he thought we should make our request to Congress a request to so limit it and define it that the States would be secure in all reasonable and proper exercise of the State power of regulation.

There were one or two other people who indicated that same feeling, in their statements made on the floor of the convention—I think merely one from Missouri. A motion was made to refer it back to the committee with instructions to modify it along the lines indicated by Judge Taylor. Objection was made to that, and it was referred back without instructions. Two resolutions were later reported in, the intent of the committee being to let the convention take its choice. The question was asked

whether the new one was a substitute. I think Chairman Webster of the committee wholly misapprehended the inquiry from the chair, and he said it was, whereupon the chair immediately put the question and the substitute was adopted.

It was the intention of the committee that there should be a choice between those two resolutions. But the resolution which comes here comes with the unanimous vote of the convention behind it. Everybody is of opinion that there must be a definition of the Shreveport power of the Interstate Commerce Commission if State regulation is to be secure.

The CHAIRMAN. What we understand, and I ask it because we must hasten to a close: You do not question the doctrine abstractly laid down in the Shreveport case or in the Illinois case, but you believe it was improperly employed in those cases? That is, it was applied without sufficient proof or something of that sort? What we would like to know is what you want to substitute in its stead?

Mr. BENTON. I will present that.

The CHAIRMAN. I think we fully understand this conflict between the Interstate Commerce Commission and the State commissions.

Senator KELLOGG. What I want to know is this: Suppose a State should make rates for its local manufacturers for distribution in the state so that practically only the manufactured products of that state could be distributed in the state as against interstate commerce. Do you deny the power or the propriety of the Interstate Commerce Commission to prevent that?

Mr. BENTON. I do not deny the propriety or the duty of the Congress to terminate that sort of thing if it ever arises. But I do maintain that there is no state that makes rates that way; that in a government of this sort it is to be assumed, if the government is going to run along the way it has, that state officials will want to make the Federal plan of government work well, just as much as the Federal officials.

Senator KELLOGG. But as to whether there was discrimination or not you want the State commission to be the final judge?

Mr. BENTON. I am not asking that.

Senator KELLOGG. How can you do that under the Constitution of the Uuited States?

Mr. BENTON. I am not asking that, and as long as I am not asking it I will not, unless you desire me to, go into that matter. So far as that goes, however, I may answer you in a sentence, perhaps: The power to do a thing is quite different from the doing of it. The Congress had for many decades power to regulate interstate commerce but it did not do it; and it has the power to protect interstate commerce against improper state rates, but there is no compulsion to exercise that power, and no occasion to exercise it, until the need for it arises.

Senator KELLOGG. Then, your point is that the Congress should not exercise any power to protect interstate commerce against discrimination by State rates?

Mr. BENTON. My personal judgment, which you appear now to be asking for, is that the Congress should just wipe the slate clean of the Shreveport power, and put into the act a provision similar to that which is included in the Sweet bill, in the House, which would keep the Congress informed all the time of any occasions where a State, in the opinion of the Interstate Commerce Commission, was misusing its power to make intrastate rates.

Senator KELLOGG. But commit the absolute power to the States so that no interference could be corrected by the Federal authority?

Mr. BENTON. That is my personal opinion.

Senator KELLOGG. That is what I wanted to know.

Mr. BENTON. But that is not the proposition which the National Association of Railway and Utilities Commissioners, which I represent, has now come here with. That proposition is that the Congress shall define what character of discrimination it intends to empower the Interstate Commerce Commission to abate, and provide the procedure whereby it shall be abated, and provide that the Interstate Commerce Commission, when it attempts to exercise that power, shall make its report in such form that it may appear whether the case is within the class of cases which the Congress has intended to empower the commission to deal with.

Senator POMERENE. In my judgment you are putting up an impossible proposition to the Congress when you ask that they keep themselves informed whether a rate in one State on one commodity is too high or too low.

Mr. BENTON. That is not my proposition. You see, Senator, Senator Kellogg asked me what I thought about it and I told him what I thought. That is a proposition which is not presented here. The proposition which is presented here is that presented by the National Association of Railway and Utilities Commissioners, and that is the second resolution put before their convention and adopted.

The CHAIRMAN. Let me give you an illustration for the purpose of getting your view upon it: Take my own State and the towns just across the river. Here is Moline,

Ill., which is an extensive agricultural implement manufacturing town; and then there is Davenport, Iowa, 3 miles away, or something like that, that also has similar manufacturing plants. Suppose the interstate rate from Moline, Ill., to points in Iowa had been fixed by the Interstate Commerce Commission, and the State rate from Davenport to points in Iowa had been fixed by the State commission at one-half the rate enjoyed by Moline. Of course, that would drive Moline out of business so far as Iowa is concerned. Do you contend that the Interstate Commerce Commission ought not to have the authority to inquire into such discrimination, and if found to exist to declare what the proper rate from Davenport to interior points in Iowa should be?

Senator FERNALD. That is a very fair question, Mr. Chairman, and I would like to have Mr. Benton's opinion on it.

Mr. BENTON. The exact request which I am making here on behalf of our national association is not that the Interstate Commerce Commission shall be prevented from inquiring into such a situation as the chairman has mentioned, nor, if it finds that such a rate prescribed by the State of Iowa is a rate which is too low for the service performed, and discriminates against Moline, that it shall be prevented from prescribing the proper rate to be in effect in Iowa. But, if it investigates and finds that the rate fixed by Iowa is a fair rate, the Interstate Commerce Commission should correct the interstate rate so that both of them will be fair.

The CHAIRMAN. That is all we tried to do in this law. We did not intend to cover a situation that is not parallel to that.

Senator POMERENE. Let me make another suggestion, and it may be you have touched upon it, as I have not been able to be here all the time because of other engagements, but when we had the transportation act before this committee I was satisfied, whether it meets the approval of the public generally or not, there was never a better effort made to solve these problems than was made by the committee at that time. Railroad executives and shippers and others—I say shippers, and I have heard nothing to the contrary—seemed to appreciate the situation, and it was said that North Dakota, by legislation under the nonpartisan league, had so reduced the rates on intrastate traffic in that State that it would bankrupt every trunk line that crossed the State line if the other States would do a similar thing. Under those circumstances do you think the Interstate Commerce Commission ought to be powerless to act? Or, to put it in another way, do you not think they ought to act?

Mr. BENTON. Upon the ground which you state, Senator, I think they ought not to act and that there is no occasion for them to act.

Senator POMERENE. Then who should act?

Mr. BENTON. I think you are misinformed as to the situation in North Dakota. I said something about those rates the other day in reply to a question by some member, but, assuming to be true all that you have said, the courts of North Dakota, or the courts of the Federal Government, would protect against such rates. Under the Constitution, if the United States Supreme Court has correctly construed it, the regulation of rates for purely intrastate traffic was reserved to the States, and I believe wisely.

Senator POMERENE. With certain qualifications, that is true. I have never heard the Shreveport case successfully controverted. I do not know that anybody has denied it.

The CHAIRMAN. The Shreveport case, however, Senator Pomerene, was not put on the basis that the Texas rates were, that they did not produce sufficient revenue.

Senator POMERENE. Probably I was thinking of some other case when speaking of that.

The CHAIRMAN. The Texas rates discriminated against rates from Louisiana and other points into Texas.

Senator PITTMAN. If the rates in North Dakota were so low that they were confiscatory would not the courts have the right to correct that situation?

The CHAIRMAN. Of course.

Senator PITTMAN. Is not that the remedy for the condition in North Dakota whether the Interstate Commerce Commission decided it before the courts did or not?

The CHAIRMAN. Personally I believe so far as insufficiency of State rates is concerned, if it is put upon the idea to raise revenue, I have been unwilling to give to the Interstate Commerce Commission power to correct, even if we could do it constitutionally, that objection. But we have been going on for years upon the assumption that the States must not discriminate against interstate commerce, that is, discriminate against people outside the State in the transaction of their business. And I have not seen any reason to change the operation of the law with respect to that phase of it.

Mr. BENTON. I have endeavored to point out, Mr. Chairman, that we do not come here asking you to change the policy of the law. But we do point out to you that

the Shreveport power was built up on section 3, which was a section which forbade any carrier to discriminate against any person or locality; and that whereas we thought we had a clear knowledge of what the courts would hold that to mean, nevertheless the Interstate Commerce Commission had given to those words a totally new meaning, and is now claiming, as I understand—although it has not put that claim into a report, where I can point to a discussion of it in any case; but I understand it is now claiming that it could have made all these orders under old section 3.

If that is so it is perfectly obvious, if there is a situation existing which the Congress wants to cure, it will not be done by merely repealing the transportation act, for the commission is going to keep on exercising and claiming the power which it says springs not only from section 13, as you have amended it, but from old section 3 without any amendment. What we would like the Congress to do is to determine the extent to which the Congress wants the Interstate Commerce Commission to set aside orders and laws of the States. We are indicating to you what in our judgment the amendment ought to be, but the Congress is the judge. Whatever the extent of the power you grant, we ask you to so limit and define it that it will be clear to the Congress and to everybody the extent to which you want the Interstate Commerce Commission to go. Then we ask you to provide a procedure which will compel the Interstate Commerce Commission to go no further than you have intended they should go; and as a part of that procedure we think it is proper that they should enter a report stating the facts that they find from the evidence upon which they rest their conclusion that the sort of case does exist which the Congress has told them they might exercise power over.

The CHAIRMAN. I assume that is for the purpose of enabling a review?

Mr. BENTON. Yes.

The CHAIRMAN. And those interested may have a review of the order of the commission, so that a court could determine whether the facts found by the commission sustained the order that was issued.

Mr. BENTON. That is the purpose of it, Mr. Chairman.

The CHAIRMAN. Well, now, what I would like to know—I think we have got a thoroughgoing view of the situation—is what the language is that you think ought to be put into the act.

Mr. BENTON. I was not aware that you were going to ask me for that this morning, and I am not prepared to give it to you. I will ask leave to put it in the form of a concrete bill, if I may. I think it probably would be more helpful to you that way, and I will either mail it to you or be glad to appear before you and present it and answer any question about it.

The CHAIRMAN. But a concrete bill would be unnecessary, for I assume it would be in the way of an amendment of the interstate commerce act or the transportation act, because we deal with that subject in both those acts, and we do not want to take up the subject entirely anew, ignoring all that has been done before.

Mr. BENTON. Of course when I said "concrete bill" I meant concrete in form of definite amendments to the interstate commerce act.

The CHAIRMAN. Well, I wish you would do that.

Mr. BENTON. I will do that. I want to say to you that the absolute necessity of providing definitions, procedure, and requirement for findings is made evident by the way the commission has handled these cases. If you will examine the several State cases, you will find that the Interstate Commerce Commission has made stereotyped findings of fact intended to confer upon itself the jurisdiction to make the orders which it has made. You see that the commission has a very peculiar kind of jurisdiction. It is jurisdiction which exists upon its finding that the case exists in which you intend to authorize it to act. In other words, by their own findings of facts they create their own jurisdiction. They do not have any jurisdiction to touch State rates until they find that discrimination exists. Now they have adopted, as you might say, a kind of Ford process—they have made stereotyped findings of fact, which they run into every case that comes before them, with rarely a variation. And I have pointed out how even the most trivial things are sufficient to them as the basis of a finding of unjust and undue discrimination against interstate commerce.

Senator PITTMAN. I understand from you that they rather find conclusions than facts upon which conclusions might be based.

Mr. BENTON. They do. In their reports they sometimes make statements of facts, but at the end of their reports and before they make their orders they throw in these conclusions, stereotyped, evidently drawn in the New York case, added to from time to time a little, but thrown into all the cases in almost identical form, it evidently having been determined that such findings were necessary to support the commission's jurisdiction in intrastate cases.

Senator PITTMAN. Well, then, judging from your answer to the chairman's question, you desire that the evidence upon which they find their facts may be a part of the record, do you not?

Mr. BENTON. My wish is that the statute as amended shall provide specifically what kind of a case they must find to exist. That they must find and incorporate in their report the facts from which they draw the conclusion. That will render, as I understand it, their action open to review in two ways. If the report alone is transferred without the evidence, it will enable a review to be taken on the question whether the conclusion is supported by the facts that they have set out in their report. If we want to review their findings of fact, we would have to review the same as we do now, by taking up the evidence. Of course, that is pretty unsatisfactory.

It is a very important aspect of the matter for the Senate to consider, that whereas the Interstate Commerce Commission creates its own jurisdiction by its finding that discrimination exists, it is established by Supreme Court decisions that if there is any evidence before the Interstate Commerce Commission tending to support the finding that the Commission's finding of fact is conclusive, and the courts won't review. The courts won't review as to whether a finding of fact is correct or not. They hold that Congress has committed to the commission the power to make findings of fact conclusively, so there is not very much to be gained ordinarily by taking up evidence, unless they have lawlessly made a finding of fact without any evidence at all.

The CHAIRMAN. As it is at the present time, the commission must find that the State rate brought into question constitutes an undue and unreasonable discrimination either against a person or a locality or against interstate commerce. Now one or the other of those findings must be made by the commission before it would have authority to proceed at all, I mean by the way of awarding a remedy. Now, you want something more specific than that?

Mr. BENTON. Yes.

The CHAIRMAN. And what I want to know is what you want.

Mr. BENTON. I will present it. I did not understand you wanted me to present it this morning, and I am not prepared to.

Senator POMERENE. Mr. Chairman, I wanted to have the benefit of that concrete suggestion. We have heard a good deal of discussion on this subject here, and I have a letter which I received this morning from the Philip Carey Co. of Cincinnati, one of the very large manufacturers and shippers, and that company presents the other view of this very subject. I want to read this letter at this time if I may. [Reading:]

PHILIP CAREY CO.,
Cincinnati, October 28, 1921.

Hon. ATLEE POMERENE,
United States Senator, Washington, D. C.

DEAR SIR: We understand that the National Association of Railway and Utilities Commissioners have presented testimony before the Senate Interstate Commerce Committee, of which we understood you are a member, in support of its request for the amendment of the transportation act, so that the Interstate Commerce Commission will not have authority to compel the removal of discrimination between intrastate and interstate traffic.

There are within the State of Illinois, numerous rates on our finished products and on the raw materials from which we manufacture these products, that are on a considerably lower basis than the interstate rates and the Ohio intrastate rates applicable from our factory at Lockland, Ohio.

It is our intention within a short time to file complaint with the I. C. C. seeking the removal of this prejudice against us and preference in favor of our competitors with factories located within the State of Illinois, from which points they ship to points of destination within the State of Illinois.

If the transportation act should be amended so as to leave the Interstate Commerce Commission without power to compel the removal of discrimination between intrastate and interstate traffic, we will be without any remedy for this matter. Furthermore, it is manifest that if the basis of rates from our factory is justified, then the Illinois intrastate rates are too low and a burden on intrastate commerce.

We believe that the Supreme Court in its decisions soon to be issued, will sustain the power of the Interstate Commerce Commission under the transportation act to compel the removal of discrimination as between intrastate and interstate rates, and believe that it would be a backward step to withdraw this power from the Interstate Commerce Commission. We believe, therefore, that Congress will not withdraw this power from the Interstate Commerce Commission and are writing you merely in order that there will be no omission on our part in having expressed to you our opinion regarding this matter. We are inclined to believe that you will agree with us that it is important that the Interstate Commerce Commission should not be

deprived of this power, and we are in hopes that you will lend your most valued efforts in having this power retained by the Interstate Commerce Commission.

Yours respectfully,

R. B. CRABBS, *Vice President.*

I express no final opinion with regard to this subject matter that is here before us now; but that is the other view, of course.

The CHAIRMAN. Well, but until yesterday I never dreamed that anybody proposed to withdraw that power from the Interstate Commerce Commission, and I do not really think that Mr. Benton even suggests the withdrawal of that power. That is a power that it has had for years and with additional facilities for enforcing the power in the transportation act.

Senator POMERENE. Yes; but there are bills pending here to repeal and take away this power.

The CHAIRMAN. Yes; but I had not thought that there would be much headway made with them.

Senator POMERENE. Well, it is a serious problem. I think the State commissions have had their troubles and I think there have been some most unfortunate rates made.

Senator POINDEXTER. There have been some unfortunate opinions, apparently, and I think that what Congress should do with the power of the Interstate Commerce Commission would depend on their decisions to some extent.

The CHAIRMAN. The acts or the conduct of the Interstate Commerce Commission is that they have apparently misconceived the law and have gone forward and have taken possession of the entire State field without any evidence of the particular discrimination which the act was intended to remove.

Mr. BENTON. Mr. Chairman, it may interest the Senator from Ohio if I call his attention to a case which is now pending before the Interstate Commerce Commission from Ohio, known as the Ohio coal-rates case.

Senator POMERENE. I know all about it.

Mr. BENTON. The Ohio Coal Rates Case is I. C. C. Docket No. 12851.

Senator POMERENE. I don't know all about that particular case, I mean to say, but I have known of the question to which you are referring; I have had a number of letters bearing on that subject. I am free to admit that there have been some very unfortunate discriminations, and it is particularly true as to the Ohio coal trade, because our Ohio mines have been discriminated against by the interstate rates made from Tennessee and Kentucky and West Virginia. That is all true. But I was looking to the other view of taking away this power entirely.

Mr. BENTON. Yes. I would like to put into the record—I had planned to do so, and if I may I will be glad to do so at this point—a statement about that case. It is a case where certain carriers serving mines outside of the State of Ohio, seek to enable those mines that are outside of the State to market their products in Ohio in competition with Ohio mines by lowering the rates to those mines and raising them to the Ohio mines. The Ohio commission allowed the entire 40 per cent increase in freight rates, following Ex parte 74, that they were asked to allow, but when the carriers came to them and asked them to advance the Ohio coal rares 16 per cent more, the while the carriers were reducing the coal rate to the outside mines 8 per cent, so as to allow the outside mines to compete with the Ohio mines, on favored terms, the Ohio commission said, and I quote its words, that this was a proposition "to make the Ohio shipper the goat," and they refused to consent to the plan.

Now, upon petition of carriers, the Interstate Commerce Commission has ordered an investigation of those Ohio rates, with a view, if they decide to do so, of compelling that additional 16 per cent advance on the Ohio rates.

Senator POINDEXTER. In intrastate rates?

Mr. BENTON. Yes.

Senator POINDEXTER. What would be the relative rate interstate and intrastate?

Mr. BENTON. I am unable to quote those two, Senator.

Senator POINDEXTER. You don't know whether they would be the same?

Mr. BENTON. No.

Senator POMERENE. Senator, this is not a new question. In the present form of these rates it is comparatively new, but this question has existed in Ohio for five or six years to my certain knowledge, and it leaves this discrimination. This so-called Hocking Valley is in the southeastern part, in the southern part, and West Virginia coal goes right past these mines in the Hocking Valley, and so forth, and on to Toledo, and taking into consideration the mileage, West Virginia coal goes through the Hocking Valley, and the portion of the interstate charge which would be properly chargeable to Ohio is very much less from the Hocking Valley mines on West Virginia coal to

how careful Congress has got to be in its delegation of authority and in the use of the language delegating that authority.

The CHAIRMAN. Of course the commission would have power to investigate the interstate rate as to its reasonableness, and cut it down if it wanted to, but we have not attempted to deal with State rates at all, except as they become discriminations against interstate commerce.

Senator POMERENE. Was your statement that these rates had been raised by the Ohio Public Utilities Commission at the request of the Interstate Commerce Commission?

Mr. BENTON. My statement, Senator, was that following the decision in Ex parte 74, where 40 per cent advance in freight rates was allowed in the eastern district, Ohio quickly granted the full 40 per cent increase, and this is an attempt to increase 16 per cent more.

Now I will read into the record, if it would interest anybody, a paragraph which I think now is put into all of the State orders. It is as follows (reading):

"*It is further ordered*, That nothing in this order shall be construed as prohibiting any carrier, party to this proceeding, from increasing any rate for the transportation of property in intrastate commerce, prescribed in this order, provided such increased rate does not exceed its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce, and provided further that such increase is made pursuant to the laws of the State of Tennessee, and with the approval of the authorities of said State."

So that you will see that they have taken jurisdiction to prevent increases in intrastate rates as well as to compel them.

Senator FERNALD. Mr. Chairman, was it the intention of the act that the Interstate Commerce Commission should interfere with State rates only when they become discriminatory? Was that the intention of the act?

The CHAIRMAN. The intention is that the Interstate Commerce Commission shall have the jurisdiction to take up a State rate which is alleged to be and proven to be a discrimination against interstate commerce, and it it finds that such discrimination exists, it then has the power to declare what the intrastate rate shall be.

Senator FERNALD. Yes. Well, now, that is well stated. Now, was it the intention also that they might have authority to take up intrastate rates when they were not discriminatory?

The CHAIRMAN. We do not deal with that question in the transportation act at all. It has always had the power to take up an interstate rate that was alleged to be either unreasonable in itself or a discrimination against any person or locality.

Senator FERNALD. And they have the power within themselves to determine whether they think it is discriminatory?

The CHAIRMAN. I think so.

Senator FERNALD. Well, that seems to be the whole question.

Mr. BENTON. Now, Mr. Chairman, right in that connection I think it would be well to call attention to another case under the power which the commission claims to have from section 3. Let me say, reverting for a moment to the Ohio case, that I understand that that is regarded purely and simply as a discrimination case, and without the revenue feature which came in under the transportation act. Now, in the State of Washington——

The CHAIRMAN (interposing). You had better state that section 3 of the original act is the section which declares that all rates shall be just and reasonable and shall forbid discrimination of any kind. That is true, isn't it?

Mr. BENTON. Yes.

Senator FERNALD. Well, now, Mr. Benton, let us get this clear. You allow, as the Chairman has stated, that they have this authority. Is it your contention that they misinterpret the language or that they exceed their authority?

Mr. BENTON. It is my claim that they have exceeded their authority. It is my claim that they have shown a disposition, a habit of making findings stated in the language of the act, without having evidence of facts before them which bring the case in which their findings are made within the spirit of the law, and what I am urging is that Congress itself determine how far it wants the commission to go, and put language into the act which will hold the commission to the delegated authority.

The CHAIRMAN. But, as the Senator says, Congress can not review all of these different cases.

Mr. BENTON. No; I am not asking that.

The CHAIRMAN. Now, do you want the language so changed in the act that this authority which they assume or you allow them to assume should be cleared so that they do not have that authority which they now claim?

Mr. BENTON. Yes.

The CHAIRMAN. That is your contention?

Mr. BENTON. That is my contention. And such procedure provided as will enable the courts to review any departure from it.

Senator POMERENE. Don't you think after these cases are decided which are now in the Supreme Court—the gentleman from Illinois the other day spoke about the cases that were pending here—that when the Supreme Court hands down its opinion in those cases it is going to clarify this atmosphere a great deal?

Mr. BENTON. I think it may tend to clarify it, but I think it is very much more probable that it will leave many, many things to be settled by litigation which Congress could easily settle by a few words put into the law now.

Senator POMERENE. Well, you are more of an optimist than I am if you think Congress can settle all these questions.

Mr. BENTON. Senator, Congress could prevent any such order being made as I am now going to call attention to.

Senator FERNALD. Well, I understand, Mr. Benton, that you are going to produce to-morrow, or right away, an amendment to the act which you suggest?

Mr. BENTON. Yes.

Senator FERNALD. Which you believe will clear the situation?

Mr. BENTON. Yes, Senator Fernald.

Senator PITTMAN. Mr. Benton, if the Interstate Commerce Commission fixed a rate lower than the Ohio rate, or lower than the Ohio rate could be placed, we will say, under the law, and that would be a discrimination in favor of West Virginia, because it was interstate commerce; on the other hand, if the State commission of Ohio could place the intrastate rate in Ohio lower than the Interstate Commerce Commission could fix the interstate rate, in accordance with justice then that would be a discrimination against West Virginia or a discrimination against interstate commerce. So that doesn't it seem that the only way that you can ever avoid discrimination on one side or the other is to have a uniform rate, I don't mean exactly, but uniform in accordance with the comparative hauls?

Mr. BENTON. I don't believe this country can ever adopt a uniform rate. That may be a statement which will not meet with accord by people from some sections of the country. But our business has grown up with rates built to meet situations. There are two classes of rates: Local rates and through rates. And many a mine and many a factory would be put out of business—New England could not live—if you established an absolute uniformity of rates. It just can not be done. Rate questions are too intricate to be settled mathematically by a rule of thumb—handing out a rule and allowing a clerk to apply it everywhere. There has got to be a judgment exercised by somebody, who ought to be competent, applied to the facts of each given situation.

Senator PITTMAN. Then your answer is that uniformity of treatment is impossible and you have illustrated New England, and therefore some one must be vested with the power of determining discrimination.

Mr. BENTON. That is my answer, Senator.

Senator PITTMAN. That is a very difficult problem.

Senator POMERENE. And you would place that with the State commissions instead of the Interstate Commerce Commission?

Mr. BENTON. No, and yes. I would place it—speaking now to the proposition I have presented here—with the State commission in the first instance. When it makes the State rates it will attempt to make them with a view not only to the business within the State, but to all the business that moves over the lines on which the rates are fixed. And if it errs and Congress passes the bill we now ask to have passed, the matter can be presented to the Interstate Commerce Commission, and discrimination can be removed, and both rates put on a just basis.

The CHAIRMAN. Mr. Benton, we will have to suspend now. Will Judge Reed be here to-morrow morning?

Mr. BENTON. He intended to be, and I expect he will.

The CHAIRMAN. I think the best way to proceed now is if Judge Reed is here, and I hope you will get him here if you can, we will hear him to-morrow morning. After that time I have agreed to hear Judge Cowan and Clifford Thorne on this same proposition. They represent a very large number of shippers in the west, especially the cattle shippers and grain shippers. And we will resume your testimony when you have prepared and are ready to submit to the committee the concrete changes which you propose in the bill. I think that we can reach an intelligent conclusion a great deal more quickly if we have before us exactly how you propose to amend this law.

Mr. BENTON. Mr. Chairman, I have just been speaking of the Nebraska situation. I made reference the other day to an attempt on the part of Nebraska shippers and carriers and commission to get some rates into effect under the present state of affairs

and suggested that it took several weeks. I telegraphed to the chairman of that commission and asked him if he would not send me a statement covering it, so that I could put the facts before you more accurately than I had done, and he sent me a letter, which I would like to read, if I may.

The CHAIRMAN. Very well.

Mr. BENTON. The letter is as follows [reading]:

OCTOBER 28, 1921.

Mr. JOHN E. BENTON,
General Solicitor National Association
of Railway and Utilities Commissioners,
Washington, D. C.

MY DEAR MR. BENTON: We have your telegram of even date, asking for a history of the proceedings leading up to the approval by the Interstate Commerce Commission of State-wide rate adjustments in Nebraska subsequent to that commission's order in Ex parte 74.

The rates involved covered the movement, intrastate, of sand, gravel, and stone, and also brick, hollow building tile and cement blocks. A demand on the part of shippers for a readjustment of rates on both of these classes of commodities had been made even prior to the war. A complaint directed at the brick rates was pending before this commission when the roads were taken over by the Federal Government. While sand shippers had not filed formal complaints, they had taken up at various times inequalities in the sand rate schedules and had urged action looking to a readjustment. It was admitted by the carriers that the rates in both instances, both as to structure and to quantity, were inequitable and should be modified.

At the hearing before the Nebraska commission on the carriers' application for an increase in State rates of 35 per cent to correspond to the increase in Ex parte 74 shippers again called attention to the maladjustment in brick and sand schedules and were assured by carrier representatives that in the event of a general increase of rates the schedules complained of would be taken up and corrected. In its order, however, the Nebraska commission made an exception as to brick rates and exempted this commodity from the application of the 25 per cent increase authorized. As to sand a maximum was provided of 160 per cent of the rates in effect at the time General Order No. 28 was promulgated. Hearing was had before the Nebraska Commission on the brick rates October 26, 1920. At that time the carriers submitted distance schedules of rates as their idea of what should be done to remedy the situation. Shippers objected to the rates as being too high. While this case was still pending before the Nebraska commission the Interstate Commerce Commission issued its Shreveport order No. 11829, setting aside the Nebraska commission's order and authorizing an increase on all commodities of 35 per cent. Immediately thereafter the carriers secured an injunction in the Federal court restraining the commission from interfering with the enforcement of this order. This necessitated a suspension of any action by this commission on brick rates. Whereupon, shippers and representatives of this commission took up with the carriers the necessity of making some adjustment and the carriers indicated a willingness to enter upon negotiations.

We inclose herewith a brief summary of the various steps taken during the progress of the negotiations. It should be stated in this connection that complaints directed at the adjustment on sand rates in Nebraska were filed with the Interstate Commerce Commission on behalf of interested shippers. On March 9, 1921, it will be noted, a conference was held at Omaha between sand and gravel shippers and traffic officials of the various roads. On April 27, 1921, a further conference was held at Chicago, participated in by Examiner Disque, of the Interstate Commerce Commission, Commissioner Browne, of the Nebraska commission, and representatives of the shippers and carriers. The second week in April the writer, after consultation with his associates and with shippers, concluded to visit Washington and lay the whole matter of Nebraska rates before Chairman Clark of the Interstate Commerce Commission. This he did, with the result that an order was finally made, amending the order in No. 11829, which had the effect of reinstating certain orders issued by the Nebraska commission made between July 26, 1920, and February 28, 1921. At this conference the chaotic condition with reference to State rates was described to Chairman Clark, but we were assured that unless the carriers would voluntarily agree to a readjustment no way could be found for a readjustment except by complaint to the Interstate Commerce Commission, and some doubt was expressed as to whether or not changes could be effected in that manner.

It will be noted from the summary submitted that May 24, 1921, Chief Examiner Quirk advised that the Interstate Commerce Commission would approve the carriers' proposed schedule for interstate traffic and thus enable them to effect the same adjust-

ment intrastate. It is important to remember in this connection that in both instances the basis of negotiation throughout was the schedules submitted by the carriers and that these schedules were modified but slightly before being agreed to. In other words, the State commission and the shippers particularly had to accept the carriers' rates or get nothing. Even after Mr. Quirk had indicated that the Interstate Commerce Commission was ready to approve the schedules as agreed to, and even after that commission had been advised that the shippers and the State commission had agreed to the rates, action could not be secured. Traffic representatives of the Nebraska carriers made at least three trips to Washington, seeking to find a method by which to file the rates and make them effective on intrastate traffic. It finally became necessary for a representative of the carriers, Commissioner Browne, and certain Nebraska shippers to appear before the Interstate Commerce Commission with the carriers' application and to urge its immediate approval. This approval was not forthcoming until August 26, 1921. It is very probable that affirmative action would not yet have been secured had not constant pressure been exerted upon the Interstate Commerce Commission.

In justice to that body it should be stated that their delay was due to any not unwillingness to make the readjustment, but through doubt on their part as to how the thing desired could be accomplished. It is significant, also, that the order as finally issued was in the form of an amendatory order to No. 11829, whereas the commission had stated to the writer and to others that all that would be necessary would be for the carriers to file the rates desired interstate and that then the same schedule could be made applicable to intrastate traffic by complying with State requirements as to filing. The procedure at best is awkard, tedious and unsatisfactory and the shipper is dependent wholly upon the generosity of the carriers for any reduction or favorable readjustment.

We trust this supplies you with the information desired.

Yours, very truly,

H. G. TAYLOR, *Chairman.*

P. S.—When the State authorities made the rates inequalities were ironed out quickly by agreement when necessary and no state-wide sand and brick schedules were ever made. Now with all authority over State rates lodged at Washington, it takes months for adjustments to be made, and scales over wide areas are the only way shippers can get a measure of protection.

Mr. BENTON. The summary referred to in Chairman Taylor's letter is as follows [reading]:

"On March 9, 1921, conference held at Omaha between sand and gravel shippers and traffic officials of various railroads.

"Conference held at Chicago on April 27, called on the suggestion of R. E. Quirk, chief examiner of the Interstate Commerce Commission, attended by Examiner Disque, Commissioner Browne, U. G. Powell, representing complainiants in cases filed with the Interstate Commerce Commission, H. H. Holcomb, freight traffic manager, and K. F. Burgess, general attorney, of the Burlington. 'Examiner Disque stated that if the shippers and carriers would come to mutual understanding as to a fair and proper scale of rates on sand in Nebraska, and an application be presented, signed jointly by the carriers and the interested shippers, that he believed the commission would make the necessary order permitting the publication of rates as agreed upon.' (Letter of Mr. Montgomery, dated Apr. 30, 1921.)

"Conference held at Lincoln at the offices of the commission on Monday, May 9, attended by representatives of carriers and various sand shippers.

"Telegram dated May 24, 1921, from Chief Examiner Quirk, advising 'if your commission will approve carriers' proposition as most practical present adjustment * * * this commission will permit carriers to file that adjustment interstate, thereby enabling them to effect same adjustment intrastate.' Answered May 25, 'We think suggested carrier scale best present adjustment and will approve it.'

"Letter written to Mr. Quirk by Commissioner Browne on June 4, confirming telegram and stating, 'we have asked the carriers to provide carload rates from pits to nearest billing station, which distances are usually from 1 to 5 miles, and, with the possible exception of the Rock Island, this will be provided. We trust the Interstate Commerce Commission will make similar arrangements covering the interstate traffic.'

"June 4, 1921, Mr. Quirk wrote, "It is my understanding that the Burlington will arrange to establish the scale of rates heretofore suggested by it with the modifications suggested by your commission on interstate commerce in the immediate future, and that it will at the same time arrange for your commission to establish the same scale intrastate.'

"Order entered by the Interstate Commerce Commission on July 9, 1921, reopening No. 11829, Nebraska fares, rates, and charges, in so far as it applies to rates on sand and gravel in carloads.

"On July 30, 1921, copy of petition of the carriers to the Interstate Commerce Commission, was submitted to the Nebraska commission. The petition asked for a special order in docket No. 11829 permitting carriers to establish and make effective rates for transportation of sand and gravel and stone, also brick, hollow building tile, and cement building blocks.

"On the same day Chairman Taylor addressed a letter to Chairman Clark of the Interstate Commerce Commission in re petition mentioned in paragraph above stating 'The Nebraska commission offers no objection to the rates as proposed, such approval, however, being without prejudice to any pending or proposed litigation with reference to jurisdictional questions and without any finding as to the reasonableness of the rates per se.'

"On August 6 a letter was addressed to W. M. Daniels of the Interstate Commerce Commission, advising that the petition before that body would be filed by Mr. Montmorency the coming week in person, and that he would possibly be accompanied by Commissioner Browne. The letter further stated that the shippers are very desirous of having the rates made effective at once.

"On August 26, 1921, an order was entered by the Interstate Commerce Commission in 11829, amending previous orders so as to permit carriers in Nebraska on or before October 10, 1921, to establish upon notice of not less than five days', rates on sand, gravel, and stone, also on brick, hollow building tile, and cement building blocks."

Mr. BENTON. That shows that the rates that they wanted to put in were agreed upon in April. That the chairman then came here. That it took three trips by shippers to Washington, and another trip by Commissioner Browne, of Nebraska, in company with one of those groups of shippers, to finally get the authority, and that it was obtained August 26.

Senator POINDEXTER. Do not forget this Washington case that you started to state; bring that up the next time.

Mr. BENTON. Yes.

The CHAIRMAN. We will now take a recess until to-morrow morning at half past 9 o'clock, hoping to hear Judge Reed. The hearing will be held in this room.

(Whereupon, at 11 o'clock a. m., an adjournment was taken until Tuesday, November 1, 1921, at 9.30 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

TUESDAY, NOVEMBER 1, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment at 9.30 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will come to order. Judge Reed, are you ready to proceed?

Mr. REED. Yes, sir.

The CHAIRMAN. You will please state your name, and your official position.

STATEMENT OF HON. CLYDE M. REED, CHAIRMAN PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS.

Mr. REED. It is not my purpose at this time to discuss the legal questions involved in the transportation act. That has been very ably done by Mr. John E. Benton, solicitor of the National Association of Railway and Utilities Commissioners; by Mr. Carl D. Jackson, president of the association; and by Judge Ledyard P. Hale, attorney for the New York Public Service Commission, and by others.

The purpose of my appearance before this honorable committee and the statement made is to narrate the history of what is known as the Kansas case, and to state in as much detail as may be desirable the facts and circumstances relating thereto.

THE INTERSTATE COMMERCE COMMISSION CONSIDERED EX PARTE 74 A REVENUE CASE.

That the Interstate Commerce Commission considered Ex parte 74 a revenue case is set out in its report in that case. In the beginning of its report the commission says:

"In this proceeding the carriers by railroad subject to our jurisdiction seek authority pursuant to the provisions of section 15a of the interstate commerce act, to increase their freight revenues to a basis that will enable them to earn an aggregate annual net railway operating income equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. (58 I. C. C., 223.)

"In making their proposals in this proceeding the carriers have observed generally those three groups, but the carriers in New England and in the southwest have brought to our attention the peculiar financial needs of the railroads in those territories. (58 I. C. C., 224.)

"Evidence has been submitted tending to show that we should accord to the carriers the maximum per cent authorized by the Congress. (58 I. C. C., 226.)

"The calculations of the carriers as to the increases in revenue needed by them * * *. (58 I. C. C., 227.)"

On the following pages of its report the Interstate Commerce Commission discusses the needs of the carriers in various groups. The captions for such discussion are stated as follows: "Revenue needs of carriers in eastern group;" "Revenue needs of carriers in southern group;" "Revenue needs of carriers in western group;" "Extent and method of obtaining needed additional revenue."

As has been previously pointed out in these hearings, the Interstate Commerce Commission realized that the time required for consideration of so gigantic a problem was too short to permit an accurate finding in all details, for on page 243 of its report, it further says:

"It would be desirable, if it were possible, to determine definitely the commodities, the sections of the country, and even the individual rates which can best bear the

burden of increases, and the relationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented."

THE RAILROADS ALSO CONSIDERED, EX PARTE 74, A REVENUE CASE.

Following the order of the Interstate Commerce Commission advancing interstate rates, fares, and charges, the carriers applied to the several States for increases in intrastate rates, fares, and charges. In the Kansas case a hearing was held at Topeka September 2, 1920. In opening the case counsel for the carriers said:

"This is an application of the carriers in the State of Kansas for an increase of 35 per cent over present rates and 20 per cent increase in passenger rates and 50 per cent surcharge on passengers occupying Pullman space, in accordance with the opinion of the Interstate Commerce Commission, handed down sometime ago. * * * (Rec., p. 2.)

"Now, this whole question revolves around the mandatory provisions of section 15 (a) of the Interstate Commerce law as amended. (Record, p. 3.)

"Therefore, this is not an ordinary rate case; this is a revenue case. (Record, p. 8.)

"Now, this Interstate Commerce Commission's authority was paramount in this matter, it was not a state proposition, it was a proposition involving the rates of all the railroads in that group. As I said, they might, under the statutes, have put the railroads of the country into one group, but they had authority to subdivide it into zones and they did so, putting this territory in the western group. (Record, p. 9.)

* * * * * * *

"Judge HUGGINS. I wanted to ask a question first before you start out. Is your position here as representing the carriers stated in very few words, simply this, that the only thing that this body can do is to sign on the dotted line and that we have no discretion?

"Mr. SMITH. As to allowing this 35 per cent increase on freight rates on existing rates, that is the sole duty of this commission.

"Judge HUGGINS. And what about the passenger rate?

"Mr. SMITH. Same as to the passenger rate.

"Judge HUGGINS. I see. We are simply going through a form, a ceremony here at the end of which we must subscribe to the charter and by-laws before we can become full members by signing?

"Mr. SMITH. By reading the interstate commerce act you will see you are justified in doing that. (Rec. pp. 36–37.)

* * * * * * *

"Judge REED. Do I understand your position to be that Congress vested the Interstate Commerce Commission with discretion in the ascertainment of the additional revenue necessary and withheld the exercise of any discretion from the State commission?

"Mr. COLEMAN. Absolutely. Otherwise the transportation act would be a joke. Only one body can do it. If Congress can do it and 48 States could interfere with them, the plan would be useless.

"Judge REED. In that event, wouldn't it have been much simpler to have vested the entire power with the Interstate Commerce Commission without necessity of such a proceeding as this?

"Mr. COLEMAN. They gave the entire power to the commission for the purpose of increasing efficiency and initiating these freight rates, but they left you the power to consider the reasonableness of a particular rate." (Rec. pp. 38–39.)

The CHAIRMAN. If that was the position of the railroads, why did you not ask them why they applied to the Kansas commission at all?

Mr. REED. I think that does appear in the record, Senator. Perhaps I did not read it as clearly as I should. But that is the question here:

"In that event, wouldn't it have been much simpler to have vested the entire power with the Interstate Commerce Commission without necessity of such a proceeding as this?"

As a matter of fact, it appears in the Kansas record that the railroads claimed they were applying to the Kansas commission merely as a matter of courtesy and form; that the Kansas commission, and the other State commissions had absolutely no power left, under section 13 of the act.

In the proceeding in Kansas beginning September 2, 1920, the carriers introduced the record as made before the Interstate Commerce Commission, and nothing else. It was conceded by counsel for the carriers that that record did not undertake to show in any particular the value of the property in Kansas, the cost of operation in Kansas, the revenues in Kansas, or anything relating in any way, directly or indirectly, to

any particular rate, or the condition of traffic or the reasonableness of the rates upon any class or commodity of traffic in the State of Kansas.

Thereupon the Kansas commission, through its attorney, asked the carriers to furnish certain information relating to the business of the railroads in Kansas, and recessed until September 16 for the purpose of permitting that information to be furnished.

Upon reconvening September 16 certain statements prepared by the Kansas carriers were brought before the Commission, but the carriers refused to assume any responsibility for them and objected to their introduction as evidence in the case.

The carriers were very frank in their position that the Kansas commission had no power or authority in the premises—that the Interstate Commerce Commission had relieved it of all responsibility except to order the same percentage of increase on intrastate business as had been ordered on interstate business, regardless of any differences in conditions that might apply to the two classes of traffic or to some form of intrastate traffic. Mr. J. L. Coleman, counsel for the carriers, said:

"It is not my purpose to put in any witness but our men are, of course, willing to anyswer any question which Judge Helm may put to them, but they are wholly his witnesses." (Rec., p. 173.)

Appearances had been entered and witnesses appeared representing a large number of shipping interests, particularly oil, cement, and live stock, and representatives of Kansas commercial organizations who gave testimony upon the class rates.

Consideration by the Kansas commission proceeded upon the basis of the revenue needed by the carriers as declared by the Interstate Commerce Commission and further emphasized by the carriers, and on October 9, 1920, an order was made raising rates in Kansas to the extent that the testimony in the case indicated was required to bring carriers in Kansas a 6 per cent return above operating expenses and taxes.

The CHAIRMAN. Who made the order?

Mr. REED. The Court of Industrial Relations. I would be glad to put a copy of the Kansas order in the record here, if it is desired.

The CHAIRMAN. That may be done.

(The order referred to is not printed, but a copy is on file with the clerk of the committee.)

No increase was allowed in passenger fares, and no increase was allowed upon crude oil and commodities basing thereon. Increases expressed in cents per 100 pounds were allowed upon brick, cement, crushed stone, sand, gravel, and coal, and a 30 per cent increase on other commodities. The opinion and order of the Kansas Court of Industrial Relations (which by legislative act has been superseded in utility and railroad supervision and regulation by the Kansas Public Utilities Commission) are made a part of this record herewith.

ILLUSTRATING HOW A CASE INTENDED TO PRODUCE REVENUE MAY BE CHANGED INTO A DISCRIMINATION CASE, AND FINDING BY THE INTERSTATE COMMERCE COMMISSION MADE ACCORDINGLY.

The carriers promptly filed complaint with the Interstate Commerce Commission against the order of the Kansas commission, as was done in other States. The principal allegation was that the Kansas order was a discrimination against interstate commerce.

The Interstate Commerce Commission docketed this complaint under Docket No. 11916 and set a hearing at Topeka before Attorney-Examiner Disque on March 1, 2, 3, and 4, 1921.

At this hearing the carriers introduced practically no evidence on the revenue side of the question. Practically all of the testimony offered by them related to the difference in rates which was claimed by them to be discriminatory.

I will not undertake to discuss here the legal definitions of discrimination. As I stated in the beginning, that has been done by other witnesses appearing before this committee.

Starting 35 or 40 years ago the Missouri River was used by the railroads as a rate basing line. Traffic moving across the river did so on rates that sharply increased on the west side. Kansas has been engaged in a struggle for a quarter of a century to overcome the inequity of the original rate basing method. As its traffic and commerce has increased to a point that is comparable with the territory between the Mississippi and the Missouri Rivers, Kansas has sought to have its rates adjusted accordingly, and the carriers have fought such an adjustment at every turn. I make this statement that the underlying philosophy of the Kansas rate order may be clearly understood.

In its report in this case the Interstate Commerce Commission made a finding that traffic conditions on interstate and intrastate commerce are, generally speaking, the same. It says:

"Kansas intrastate traffic traverses the same lines of railroad as does interstate traffic. All lines handle both State and interstate business on the same rails. The same kind of service and the same kind of railroad conditions prevail within Kansas as between Kansas and Nebraska, for instance, or between Kansas and Missouri or Kansas and Oklahoma. Generally speaking, there is no difference between the intrastate and interstate transportation conditions in any service, freight or passenger. (62 I. C. C. 445.)"

In addition to finding that interstate and intrastate traffic moved under the same conditions, the Interstate Commerce Commission in its report in this case also found that many intrastate rates in Kansas were higher than the corresponding rates upon which competitive traffic moved in and out of the State. Specifically it found:

"The Court of Industrial Relations calls attention to the fact that the intrastate class rates between most points in Kansas, except from jobbing points, are based on the Kansas mileage scale, and that the rates are relatively higher than the specific rates from Kansas City and St. Joseph, Mo., to points in Kansas.

"It was also developed by the Court of Industrial Relations that there are practically no joint class rates in Kansas, nor from Kansas City or St. Joseph, Mo., into Kansas. As most of the roads in Kansas reach Kansas City and St. Joseph, Mo., with their own power, jobbers at those points can reach almost all points in the State by a one-line haul: that is, they can deliver their traffic to the road which reaches the destination to which they desire to ship, but as all roads in Kansas do not serve all distributing points in the State, jobbers who ship to a destination on a road which does not serve the point where they are located must pay the combination of locals. These combinations are much higher than the single line rates for equal distances from Kansas City and St. Joseph, Mo., and, incidentally, much higher than the joint rates for equal distances within Missouri. * * *

"Many rates on live stock from Kansas points are relatively higher to Wichita, Kans., than to Kansas City, Mo. For instance, for a 61-mile haul the rate on horses to Wichita is $37.50 per car, while Kansas City pays $31.50 for a haul of similar length. The rates to Kansas City are specific rates, while those to Wichita are based on the intrastate mileage scale, which has general application. On lumber, Wichita pays 29.5 cents for an intrastate haul of 250 miles. Kansas City, Mo., can ship that distance into Kansas on a specific rate of 24.5 cents. On broom corn, which it draws from points in Kansas, Wichita must generally, except for short hauls, pay the same rate from a given point as Kansas City, Mo., although the distance to the latter point is much greater. This is due to the fact there are specific commodity rates from the producing points to Kansas City, while the general intrastate mileage scale, providing rates relatively higher, applies to Wichita, but the mileage rate to Wichita is not used where it exceeds the specific rate to Kansas City. It is noted that on broom corn from Elkhart, Kans., for instance, the rate to Kansas City and Wichita is 59.5 cents per 100 pounds. The distance from Elkhart to Wichita is 300 miles, and to Kansas City 459 miles. Wichita is the largest broom-corn market in the world. About 90 per cent of the tonnage goes into storage and is later shipped out on the basis of the through rates from point of origin to final destination.

"Included in the criticisms made by the Court of Industrial Relations are the rate. on grain from Collyer, Kans., to Kansas City, Kans., versus the rates to Chicago, Ills To Kansas City, Kans., 334 miles, the rate is 23.5 cents and the earnings per ton-mile 14 mills. To Chicago, 792 miles, the rate is 44 cents and the earnings 11.1 mills per ton-mile. The distance to Chicago is 237 per cent of that to Kansas City, Kans., whereas the rate to Chicago is 187 per cent of the rate to Kansas City, Kans. It is pointed out that if the ton-mile earnings on the intrastate rate remain constant for application to the interstate haul, the rate to Chicago would be 56 cents. On salt from Hutchison to Phillipsburg, Kans., 322 miles, the rate is 23.5 cents, yielding 14.6 mills per ton-mile, while from Hutchison to Centaur, Mo., 489 miles, the rate is only 3 cents higher, or 26.5 cents, yielding slightly over 10.8 mills per ton per mile. The interstate haul is 152 per cent of the intrastate haul, but the interstate rate is 104 per cent of the intrastate rate. On coal from Pittsburg to Hutchison, Kans., 216 miles, there is an intrastate rate of $2.40 per ton, yielding 9.4 mills per ton-mile, which is cited in comparison with a rate of $2.16 per ton from Henrietta, Okla., to Neodesha, Kans., 230 miles, yielding 9.4 mills per ton-mile. A rate of $1.85 per ton on coal for a haul of 185 miles from Springfield to Chicago, Ill., yielding 10 mills per ton-mile, is compared with the rate of $2.05 per ton for a haul of similar length from Pittsburg to Wichita, Kans., yielding 10.7 mills per ton-mile. Several instances are shown in which there are less-than-carload commodity rates from Kansas City, Mo., to points in Kansas on sugar, coffee, canned goods, beans, and sirup from 1.5 to 3.5 cents lower than for equal distances in Kansas.

"Many other instances were shown by the Court of Industrial Relations where the rates are relatively higher intrastate than interstate. * * *

"In many instances the Kansas intrastate rates (on cement) at present in effect—that is, without the increases sought by the carriers in this case—are for equal distances as high as, or higher than, the interstate rates to, from, and through the State; and if the increases sought are made, the Kansas mills as to intrastate traffic will, of course, be at a still greater disadvantage.

"If the intrastate rates are increased to the extent sought by the carriers, many intrastate rates will exceed the interstate rates, even between the same points in Kansas. The interstate rates applicable between points within the State of Kansas via intrastate routes are nothing more nor less than proportional rates. However, in this connection we may call attention to the amended orders in several intrastate cases that have been before us, which provide that no carrier is required to maintain a higher intrastate rate than its corresponding interstate rate.

"The increases sought by the carriers would also create new departures from the long-and-short-haul rule and increase the extent of existing departures. * * *

"With an order in this case conforming to the amended orders in previous cases—that is, providing that a carrier is not required to maintain any higher intrastate rate than the interstate rate applicable via intrastate routes between the same points—difficulties of the kind referred to could be avoided. (62 I. C. C. 445, 446, 450.)"

Now appears the most extraordinary situation that has been developed so far as I have knowledge in any order of the Interstate Commerce Commission in any of the State-rate cases.

After finding that conditions of traffic both interstate and intrastate were substantially similar, and after finding that a great number of intrastate rates in Kansas were higher than the corresponding interstate rates, the Interstate Commerce Commission swept aside, except as to rates on crude oil and articles basing thereon, the whole fabric of Kansas State rates, including those which it specifically found were higher than corresponding interstate rates. Its finding on this point was:

"We further find that the increases made by said carriers in charges for freight services under our decision relating to the western group in Ex parte 74, and now in effect, result in reasonable charges for interstate transportation within the said group, and that the failure of said respondents within the State of Kansas correspondingly to increase their intrastate charges for freight services in force on the date of our decision in Ex parte 74 * * * resulted in the past and will result in the future in undue prejudice to persons and localities outside the State and in unreasonable preference to persons and localities within the State, and in unjust discrimination against interstate commerce.

"We further find that said prejudice, preference, and discrimination should be removed by making increases in the intrastate charges for freight services * * * in force on the date of our decision in Ex parte 74, which shall correspond with the increase heretofore made and now in effect as aforesaid by respondents in the interstate charges in the western group. (62 I. C. C. 457, 458.)"

About the time it wrote its opinion and order in the Kansas case the Interstate Commerce Commission evidently suffered some twinges of conscience. It must have realized that it was wholly inconsistent in setting aside intrastate rates already higher than corresponding interstate rates. Then followed the most extraordinary phase of this extraordinary case. In its order in the Kansas case there was a realization that not all the Kansas rates set aside could by any stretch of the imagination be called discriminatory. Yet it nullified the act of the Kansan commission and swept aside all of the Kansas States rates, whether discriminatory or not. Then it authorized, in the extraordinary language quoted below, the carriers to determine what was discriminatory and what was not. In other words, it transferred its legal power to determine discrimination to the railroads. I quote here from the order of the Interstate Commerce Commission in Docket No. 11916, Kansas Rates, Fares, and Charges:

"*It is further ordered*, That nothing in this order shall be construed as requiring or authorizing any common carrier to establish, put in force, or maintain any rate, fare, or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare, or charge applicable to the transportation of passengers or property in interstate commerce from, to, or at the same points in effect on the date hereof, or greater than its corresponding rate, fare, or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce."

The Kansas carriers are not so thin-skinned as the Interstate Commerce Commission. Notwithstanding the findings of the commission and the language of the order, they blithely proceeded to raise freight rates in Kansas the full percentage of increase

allowed on interstate rates by the Interstate Commerce Commission, notwithstanding the fact that in thousands of instances the State rates were already higher than the interstate rates.

The CHAIRMAN. That was simply in violation of the Interstate Commerce Commission?

Mr. REED. We have been back, as I will develop later on, to the Interstate Commerce Commission. We have been to the Federal court twice, and we have been back to the Interstate Commerce Commission, and we can not get any relief. Our rates are frozen up.

The CHAIRMAN. You do not have any doubt about my statement, do you?

Mr. REED. I don't think there is any doubt about it. But we can not get the Interstate Commerce Commission to see that it was a violation of their order. I have diligently sought to get the Interstate Commerce Commission to see that it was a violation of their order, but up to this time they have not said so.

In the meantime and before the new tariffs of the Kansas carriers were filed, the railroads had gone into the United States district court for the district of Kansas and obtained an order restraining the Kansas Commission from interfering in any way with the rates, fares, and charges imposed under authority of the Interstate Commerce Commission.

I might say there that that proceeding in the court was the proceeding followed in all the cases. In the State of Kansas we made the same perfunctory resistance as was made in all the State rate cases. In the Illinois case, when the Federal courts practically refused to hear the attorney general of Illinois, there was not much use to try to make any fight in the inferior Federal courts, so that all of the States went through the motions of entering their appearance, and making their motions, but had to rest until they could get a case through the United States Supreme Court.

After the Kansas carriers had filed their new tariffs and it had been ascertained that they had totally disregarded the modifying clause of the Interstate Commerce Commission order, the Kansas commission went back into the Federal courts to restrain the carriers from misinterpreting the order of the Interstate Commerce Commission. Between the time of these proceedings the chairman of the Kansas commission had telegraphed to the chairman of the Interstate Commerce Commission protesting against the acceptance of the freight tariffs prepared by the Kansas railroads and filed with the Interstate Commerce Commission. The chairman of the Interstate Commerce Commission stated that so far no tariffs in violotion of its order had been called to the attention of the commission, but that the commission would be happy to proceed upon complaint being made.

In other words, the Interstate Commerce Commission said to Kansas, if you have complaints of any rates, make them and bring them to our attention.

The effect of this was to transfer the burden of showing discrimination from the carriers that imposed such discrimination to the State of Kansas. But the telegram of the chairman of the Interstate Commerce Commission was sufficient for the Federal district court of Kansas, which dissolved the restraining order, dismissed the application for an interlocutory injunction and directed the State of Kansas to return to the Interstate Commerce Commission and seek its remedy there. There being nothing else to do, the State of Kansas proceeded to follow the advice of the United States District Court of Kansas and filed a petition with the Interstate Commerce Commission setting out its grievances and furnishing illustrations of the violation of the Interstate Commerce Commission order in the Kansas case.

The Kansas commission prayed the Interstate Commerce Commission:

"To hear and consider its above and foregoing motion, and to make such appropriate order herein, amendatory of or supplementary to, said order of July 6, 1921, as shall clearly define and construe the provision of said order which is hereinbefore set forth, and shall prevent carriers operating in the State of Kansas from continuing, under claim of compliance with said order, to impose unjust, unreasonable, and unlawful rates for transportation between points in Kansas which are greater than rates in effect for application on interstate traffic between Kansas and the surrounding States, including the specific examples set out in the attached exhibits, and any and all other such rates as under such claim they have put into effect and are now demanding and collecting, as aforesaid.

"The applicant further prays that the commission give this matter immediate consideration, and pass upon it informally and announce its conclusion at the earliest date practical."

Did the Interstate Commerce Commission interpret its order and thus clarify the matter in the manner prayed for by the Kansas commission? It did not. It reopened the case for a further hearing and on the 10th day of September, 1921, it made an order, of which the following is a part:

"*It is ordered,* That said case be, and it is hereby, reopened for further hearing with reference to specific intrastate rates, fares, or charges applicable within the state of Kansas that may be higher than interstate rates, fares or charges to or from Kansas points.

"*It is further ordered,* That said case be set for further hearing before Attorney Examiner Disque, at Topeka, Kans., at the office of the Public Utilities Commission of Kansas, at 10 o'clock a. m., October 6, 1921."

Extraordinary situations thus accumulate. The original order of the State of Kansas having been set aside on the ground of discrimination on the basis of the findings of fact set out herein, and the railroads having put into effect intrastate rates higher than corresponding interstate rates, the State of Kansas is now allowed in a subsequent proceeding to show the particular rates of which it complains. But in the meantime and always the Kansas carriers are collecting the higher charges which no person properly informed in the law governing the making of railroad rates and charges will contend for a moment are legal or justified.

It is true that in its report and order in the Kansas case the Interstate Commerce Commission used the following language:

"These findings are without prejudice to the right of the authorities of the State of Kansas or of any other party in interest to apply in the proper manner for a modification of our findings and order as to any specific intrastate rates, fares, or charges on the ground that the latter are not related to the interstate rates, fares, and charges in such a way as to contravene the provisions of the interstate commerce act. In appropriate proceedings we shall avail ourselves of opportunity to cooperate with the Kansas authorities in considering particularly such questions as joint rates in lieu of combination rates and the correction of the disparities due to the relocation of the line of the Atchison, Topeka & Santa Fe between Kansas City and Topeka; also any other matters that may be deemed important. (62 I. C. C., 459.)"

But in the language of Judge Hale, of New York, before this committee, the Kansas commission is not "asking for crumbs from the table of the Interstate Commerce Commission." It prefers to stand upon its legal rights and the rights of the State of Kansas as an integral part of this Government to control its own internal affairs, subject always to the national needs and to the duly and legally imposed requirements of the National Government under the Constitution.

The original order of the Kansas commission was based on the best evidence, in fact the only evidence, before it as to the revenue needs of the carriers. The Kansas commission earnestly sought to cooperate with the Interstate Commerce Commission in carrying out its program under the transportation act. The Kansas commission has at no time sought to hold the return of the carriers below the percentage fixed by the Interstate Commerce Commission under the authority of Congress. Yet we are confronted with a situation where all authority over Kansas rates has been taken away from the Kansas commission and a line of proceeding that for inconsistency and disregard of the equities of the situation probably has no parallel in recent history, if ever.

A summary of the Kansas rate situation is—the Kansas commission made an order raising the rates for the purpose of giving the railroads additional revenue, the adequacy of which has not been questioned.

The railroads applied to the Interstate Commerce Commission to set aside this order on the ground of discrimination.

The Interstate Commerce Commission ordered a hearing and after finding traffic conditions were similar and that many Kansas rates were higher than interstate rates, set all Kansas rates aside.

The railroads misinterpreted the limiting clauses of the Interstate Commerce Commission order.

The Kansas commission applied to the United States district court for relief.

The court first granted the restraining order against the railroads and then dissolved it, directing the Kansas commission to return to the Interstate Commerce Commission and exhaust its remedy.

The Kansas commission prayed the Interstate Commerce Commission to interpret and clarify its order to that the State could secure relief from the illegal charges which were being imposed.

The Interstate Commerce Commission, having transferred its powers to determine discrimination to the railroads, failed to clarify its order and reopened the case for hearing upon these specific cases, thereby imposing upon the State of Kansas the burden of pointing out every particular rate of which it complains.

A rehearing was held and an additional record made in the case, and the matter now reposes in the bosom of the Interstate Commerce Commission.

In the meantime the State of Kansas is paying the higher charges and is wholly without power to change a single one of its own rates, being restrained by the courts and not being able as yet to secure relief through the Interstate Commerce Commission.

The CHAIRMAN. Does that conclude your statement?

Mr. REED. That concludes my statement.

The CHAIRMAN. It is a very clear and understandable statement.

Senator FERNALD. It is a very excellent statement.

The CHAIRMAN. There is no essential difference, as I see it, in the Kansas case and all other cases, except this, that you did not put into effect all the rates that had been ordered by the Interstate Commerce Commission in Ex parte 74; that is, you did not raise every rate the 35 per cent.

Mr. REED. May I give you our theory of that, Senators?

The CHAIRMAN. I do not care anything about the theory, really. But you did not do it?

Mr. REED. No, sir.

The CHAIRMAN. You made some exceptions?

Mr. REED. Yes; we made some exceptions.

The CHAIRMAN. Have you made an estimate with regard to the effect on the revenue of those exceptions?

Mr. REED. Yes; we treated the case in the beginning as a revenue case, and our order, if you will read and analyze it, it deals with the question of the business of the carriers in Kansas. It is the best effort that we could make to give the carriers their 6 per cent return. We accepted the valuation of the property as found by the Interstate Commerce Commission. We accepted the rate of return which they found, and then we proceeded to apply the factors to the Kansas business, and we made an order based on the Kansas business that would give the railroads 6 per cent return. And that has never been questioned; the adequacy of the order from the revenue standpoint has never been seriously questioned anywhere. Immediately now, althgugh starting out on the revenue basis, this proceeding was transferred to a discrimination proceeding, and not a revenue proceeding.

The CHAIRMAN. Well, the application originally made by the carriers to your commission might well be based upon the revenue needs, because it is the purpose of the State commission to see that they get proper revenue, just as it is the purpose of the Interstate Commerce Commission. You may not have been bound by the 5½ or 6 per cent basis; I do not say you were.

Mr. REED. But we were. We accepted it.

The CHAIRMAN. But in every case where the carriers come before the commission and say that the bases of the rates is too low—they do not afford sufficient revenue—you are bound to consider that proposition, because it involves the reasonableness of the rates. But I was wondering whether you had any estimate of the difference between revenue derived upon the application of a 35 per cent horizontal increase and the revenue which was derived upon the rates which you actually put into effect.

Mr. REED. The difference in the freight revenues was about $1,200,000 a year, something of that kind.

The CHAIRMAN. That is, the railroads, if they had to use those rates, would have earned in your State on the traffic——

Mr. REED (interposing). That much more: about $1,200,000 more.

The CHAIRMAN. More or less?

Mr. REED. More, had we raised the rates to the full increase.

The CHAIRMAN. Oh, yes; had you raised them?

Mr. REED. Yes; they earned less, as it was.

The CHAIRMAN. What do you propose in the way of a change in the law; have you given attention to that subject?

Mr. REED. Of course, we do not think, to be frank, that the Interstate Commerce Commission has properly interpreted the law. But here we are tied up. Probably the simplest way to get at this is to amend the law so as to remove any doubt. An amendment of the law along the lines of the Nicholson bill, or of the Capper bill, probably should be undertaken. Of course, the Capper bill is farther reaching.

The CHAIRMAN. Have you examined the proposed changes that Mr. Benton is about to submit to us?

Mr. REED. Yes; he discussed them with me yesterday afternoon.

The CHAIRMAN. As I understand it, some of the commissioners go a little further than the others do; they insist upon an amendment to the law that will modify in its application to particular cases the Shreveport decision.

Mr. REED. Well, personally, Senator, I have never sought to go, nor does the Kansas commission seek to go, further than the Shreveport case. We do not seek to set our-

selves apart from the national system; we want to be a part of the national system and bear our part of the burdens, and having done that, we want the privilege of regulating our own business. So I do not go the full length that some of them do.

The CHAIRMAN. You agree that when such a situation is investigated and it is found by an impartial tribunal that the intrastate rate does discriminate, that the Federal Government should have the authority to remove such discrimination?

Mr. REED. I agree with that doctrine.

The CHAIRMAN. That is a very sensible doctrine.

Senator FERNALD. And that is about all there is to it.

The CHAIRMAN. The complaint is that the Interstate Commerce Commission went forward and lifted the rates in the various groups from 25 to 40 per cent without any real investigation of the discrimination which the State rates would bring about?

Mr. REED. Yes, sir.

Senator FERNALD. Or whether there was any discrimination.

The CHAIRMAN. Yes; whether there was any discrimination.

Mr. REED. Now, the Interstate Commerce Commission in its investigation found that 25 per cent increase in freight rates south of the Ohio River and east of the Mississippi River would be sufficient to give the carriers the necessary revenue. But it also found that north of those rivers and east of Chicago a 40 per cent increase would be required. In the middle-western territory from Chicago to the mountains, 35 per cent was required, and again, west of the mountains, 25 per cent. In other words, the rate base being different and the needs of the carriers being different the Interstate Commerce Commission found that different percentages of increase would bring about the desired return.

Now the rate base in different States is just as different as the rate base in these main groups. Yet the Interstate Commerce Commission denied to every State, or to any State, the power to examine its own schedules to determine whether the rate base was high or low. It merely said that you have got to raise every rate a given percentage regardless of the rate, regardless of the rate base, regardless of whether the commodity would move, regardless of whether that advance in rates created a discrimination against intrastate traffic. There was no investigation. The carriers, as I have read from this record, came before the Kansas commission, and I presume they were equally frank before other commissions—they were at least brutally frank with us. As this record shows, they said: "You have no authority in the matter at all. All there is for you to do is to sign on the dotted line. It does not make any difference what effect it has upon your traffic."

Now; that is the condition we struggled against, that is the condition we protested against. And the only point wherein the Kansas case differentiates to any marked degree from any other case is that we have struggled harder and screamed a little louder and have carried our case through more different steps in an attempt to get an adjustment of it than any other state. You see, we followed up the order of the Interstate Commerce Commission by going into court. Then we were told to come back by the Interstate Commerce Commission. We came back. They reopened the case. We have had another hearing, but we haven't got any relief.

The CHAIRMAN. Well, Mr. Benton says that the Interstate Commerce Commission has laid down the same doctrine under the original act without taking into account at all whatever changes were made in the transportation act of 1920. Do you know of any such instance?

Mr. REED. I do not recall any such instance. Mr. Benton is very much better informed than I am upon those matters, because he follows all of the rate matters in the United States, and I follow them as far as they relate to Kansas. And then I should have said in the beginning, Senator, I am not a lawyer, I am not qualified to talk legal points. I am a newspaper man, like Senator Capper.

The CHAIRMAN. Well, after all the difference between lawyers and laymen is rapidly disappearing. Everybody has to be a lawyer these days. Well, we are very much obliged to you.

Mr. REED. I am very much obliged to you, Senator, for your courtesy. I have wanted to tell you about the Kansas case, because I thought it would be illuminative of the situation.

Senator FERNALD. It has been very clearly stated.

The CHAIRMAN. We expected to hear from Judge Cowan this morning. He is not here. I stated yesterday that after you made your statement to the committee, Mr. Reed, then we agreed to hear Judge Cowan and Clifford Thorne if they were ready to be heard, and then we would recall Mr. Benton again when he was ready to present in concrete form the amendments which he wanted made to the law. He is not, I think, quite satisfied with the amendments proposed by Senator Capper or Senator Nicholson. He wants to go further.

Mr. REED. Well, Senator, we have all realized the need for an amendment of the law, and from our standpoint, and I think generally, Senator Capper was one of the first, if not the first, of our Senators to realize the situation, and he prepared a bill and has introduced it. Now, other Senators and Members of the House have prepared bills. There is one thing upon which we are all agreed, I think, and that is that the situation needs a remedy. So far as the application of the remedy is concerned, why I do not think that is very material. That is to say, I mean we can probably agree upon it—that is a better statement.

The CHAIRMAN. After we have finished with Judge Cowan and Mr. Thorne, or even before, if they are not ready to be heard, the railroads have made an application to be heard, and we shall hear what they have to say in regard to these proposed changes.

Mr. REED. Well, I supposed Mr. Benton was coming over. I have not seen him this morning; I saw him yesterday afternoon.

The CHAIRMAN. Mr. Thom, I have always rather recognized you as representing the railroads. When do you want to be heard?

Mr. THOM. As I advised the chairman, I was detained in Chicago last week by the strike situation and have, therefore, not had the advantage of hearing the testimony of the witnesses. We have heard in a general way of the importance of the subject which is being presented to the committee, and I have made application to the secretary of your committee for advance proofs of what has been said so that we may present what we have to say in an intelligent and in as brief a way as possible. We would like to have an opportunity of looking that over. A number of gentlemen have come here this morning at my request—have just arrived—and we want to prepare ourselves as soon as we know that the case in favor of the legislation is presented.

The CHAIRMAN. Until we get over the present pinch we have but an hour and a half each morning. We begin at half past 9. Latterly Senator Fernald and myself have been the only ones that have been here at half past 9. When do you want to be heard?

Mr. THOM. Just as soon as I have seen the testimony.

The CHAIRMAN. You want to see the testimony before you come on?

Mr. THOM. Yes.

The CHAIRMAN. Well, then, Mr. Thom, you can get a copy of the testimony just as soon as it is printed, and I am very anxious to get through with this, and whatever you have to say about it you will come in and say immediately after that.

Mr. THOM. Yes. I was in hopes that we would be able to get hold at once of some of the proof sheets of the testimony before it was printed so that these gentlemen that are here might be studying the question.

Mr. B. M. ROBINSON (president American Short Line Railroad Association). Senator, we are of the opinion that we will want to present some proof here for the short lines, but the officers of my association have been on a tour for the last month and have just returned, and we know nothing of what has transpired, and we would not be in a position to do anything this week in the way of appearing before the committee, because we have an important case coming on before the Interstate Commerce Commission on Friday in relation to the interpretation of section 204 of the transportation act, but just as quickly as we can be in a position to know what has transpired here we may then ask you for an opportunity to be heard, if we want to be heard by this committee.

The CHAIRMAN. It is unlikely that we will come to you this week, assuming that Judge Cowan and Mr. Thorne are going to be here.

We still have 15 or 20 minutes, Mr. Benton. Have you anything further to say this morning?

Mr. BENTON. Well, I can use 15 or 20 minutes. I would like not to be asked to try to talk about concrete amendments until I can get some amendments out that I have been working on this morning.

STATEMENT MR. JOHN E. BENTON—Resumed.

Mr. BENTON. I was asked the other day, Mr. Chairman, by you, to pay some attention to that part of the resolution which related to 15 (*a*) and particularly to point out decisions of the Interstate Commerce Commission prescribing intrastate rates where they would seem to have rested their decisions upon provisions of 15 (*a*). I might say at this point, if I may, that there are two broad grounds upon which the State commissions rest their request which has been presented for a repeal of that section. They are both covered by the resolution.

They are (1) that section 15 (*a*) has been made the occasion, and in part, at least, the alleged legal justification for the assumption of complete jurisdiction or final power over intrastate rates by the Federal commission, and (2) that the group plan of making rates and the mandate to the Federal commission contained in that section

to adjust rates which shall produce an aggregate fixed return in each group on the aggregate value of all roads within the group, produces unjust and unreasonable interstate rates.

By the laws of many of the States it is made the duty of the State commissions to represent the interests of the shippers of their States with respect to interstate rates; thus it becomes their duty to make the representations to Congress touching this phase of the matter which they make at this hearing.

The statement has been several times made in the course of the hearing, incidentally, that the Federal commission has based its orders on section 15 (a). And it was on one of those occasions that the chairman made the request, which I have referred to, to put into the record the statement which should point out the justification for this charge which has been made by the State commissions. At the outset, in order that what I will come to a moment later may be more clear, I want to point out the limits of the commission's Shreveport power before the transportation act was passed. I wish to present certain citations of cases and discussion of cases decided by the Interstate Commerce Commission and the courts before the transportation act was passed.

The CHAIRMAN. I do not just catch your point. You say these decisions, both of the Interstate Commerce Commission and the courts, are applications of the Shreveport doctrine?

Mr. BENTON. Yes; they are interpretations of the act as it stood prior to the passage of the transportation act and show that at that time it was clearly recognized that the commission had no power to set aside or hold discriminatory a rate applicable for intrastate transportation simply on the ground that it was on a lower level than the interstate rate. I want to establish the fact that that was recognized by the Interstate Commerce Commission and the courts when the act was passed.

THE EXTENT OF THE POWER OF THE COMMISSION OVER INTRASTATE RATES PRIOR TO THE PASSAGE OF THE TRANSPORTATION ACT.

The Shreveport case was decided by the Supreme Court in 1914. In the six years which intervened before the passage of the transportation act of 1920, the commission in numerous cases was called upon to exercise its power to remove discriminations forbidden by section 3 of the commerce act, and the limits of that power were settled by a series of decisions, both of the commission and of the court. The following excerpts state such limits in the language of the commission (reading):

"We have held that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored." (Board of Trade of Chicago *v.* A., T. & S. F. Ry., 29 I. C. C. 438, 443.)

Where the allowances prescribed by law for local shipments are paid, lower charges result on local than on export shipments, but mere differences in charges do not establish unjust discrimination." Shands *v.* S. A. L. Ry. Co., 34 I. C. C. 214, 215.)

"Not all discriminations are unlawful, but only those that are unjust." (American Coal & Coke Co., 36 I. C. C. 195, 197.)

"The testimony as to the alleged unjust discrimination in grain rates was exceedingly meager and unsatisfactory, consisting chiefly in a showing of the present relation of the rates themselves. It affords no adequate basis for a finding that unjust discrimination exists." (Holmes & Hollowell Co. *v.* Great Northern Ry., 37 I. C. C. 627.)

"The provisions of the act against unjust discrimination speak to the carriers of the country individually and with respect to those things for which they are individually responsible and not to the carriers as parts of a single great system." (Galloway Coal Co. et al., 40 I. C. C., 311, 315.)

"Shippers at Nashville compete with shippers at Chattanooga, Tenn., and similar points. The switching charges maintained at these points are not based on cost, but there is no evidence that Nashville shippers would be handicapped by the charges proposed at Nashville in meeting such competition. Respondents challenged protestants to show in what way and to what extent shippers at Nashville would be injured but without eliciting any convincing replies. Not every difference in rates to competing points from common points of origin constitutes unjust discrimination (City of Astoria *v.* S. P. & Ry. Co., 38 I. C. C., 16), and different switching charges at competing points may also be entirely equitable." (I. & S. Docket No. 758. Nashville Switching case, 40 I. C. C., 483, 496.)

"The mere maintenance of a lower rate for movement of traffic wholly within a State lower than a rate found reasonable by this commission for the local State portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the act. The State Public Utilities Commission of Illinois, acting

within the scope of its authority, has the undoubted right to prescribe rates of freight applicable to movements of traffic by railroad wholly within the State of Illinois. In a case which merely calls to our attention the fact that a State rate is lower than an interstate rate on the same traffic from and to the same points, we have no authority or power to condemn the State rate and take action which would be warrant to carriers to increase it to the level of the applicable interstate rate. It is only in cases where the rates prescribed by the State authorities necessarily operate to unduly prefer a State over an interstate shipper or to otherwise interfere with the proper application of rates prescribed by this commission that the authority of the Federal law is properly to be exercised." (Memphis Merchants Exchange et al. *v.* Illinois Central Railroad Co. et al., 43 I. C. C., 378.)

"We must, to make a finding of discrimination, be shown the fact of discrimination, not merely the difference in ratings without the cause and reason for the difference. Uniformity is desirable and in some instances it is necessarily required; but its absence does not prima facie connote illegality, as differences in transportation conditions may, and frequently do, require a deviation from uniformity in particular instances to accomplish the legality and reasonableness of rates which the law exacts." (National Confectioners' Association et al. *v.* Aberdeen & Rockfish Railroad Co. et al., 49 I. C. C. 566, 576.)

"It is well settled that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored, and that generally a competitive relation between the commodities must appear. (Board of Trade of Chicago *v.* A. T. & S. F. Ry. Co., 29 I, C. C., 438, 443.)" (California Walnut Growers' Association et al. *v.* Aberdeen & Rockfish Railroad Company et al., 50 I. C. C., 558, 568.)

Prior to the decision in Houston & Texas Railway *v.* United States (234 U. S. 342), cited supra, referred to as above as the Shreveport case, the question of the effect of the interstate-commerce act upon State power of regulation was discussed by the court in its opinion in the Minnesota Rate Cases (230, U. S., 352, 412). The court there said:

"State regulation of railroad rates began with railroad transportation. The railroads were chartered by the States and from the outset, in many charters, maximum rates for freight or passengers, or both were prescribed. * * * (413.) The authority of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the State. * * * The court, however, went further than to sustain the State law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the State and was destined to points outside, and this was treated as being within the State power (Peik *v.* Chicago & North Western Railway Co., 94 U. S. 164, 177, 178.) * * *

"(414) It became a frequent practice for the States to create commissions, as agencies of State supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. * * *

"(415) In Wabash, St. L. & P. Railway Co. *v.* Illinois, supra, it was finally determined that the authority of the State did not extend to the regulation of charges for interstate transportation. * * *

"But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate. And, in illustrating the extent of State power (id., p. 564), the court selected transportation across the State from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centers of commerce—the one on Lake Michigan, and the other at the confluence of the Mississippi and the Ohio Rivers, and of the Mississippi and Missouri Rivers, respectively. After reviewing decisions holding State laws to be ineffective which imposed a direct burden upon interstate commerce, * * * the court emphasized the distinction with respect to the operation of the statute upon domestic transactions, saying: 'Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question.' (Id., p. 577.)

"The doctrine was thus fully established that the State could not prescribe interstate rates but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the States and its invariable recognition by this court. * * *

"(417) When Congress, in the year 1887, enacted the act to regulate commerce (24 State. 379, c. 104), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation in which the nature and extent of State legislation, including the commission plan, were fully reviewed. (S. Rept. 46, submitted Jan. 6, 1886, 49th Cong., 1st sess.) And it was the fact that beyond the bounds of State control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

"Congress carefully defined the scope of its regulation and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the act to regulate commerce there was inserted the following proviso:

" '*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.'

"When in the year 1906 (act of June 29, 1906, c. 3591, 34 Stat. 584) Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section 1 was reenacted. Again, in 1910, when the act was extended to embrace telegraph, telephone, and cable companies engaged in interstste business, the proviso was once more reenacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. (Act of June 18, 1910, c. 309, 36 Stat. 539, 545.) The proviso in its present form reads:

"'*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.'

"There was thus excluded from the provisions of the act that transportation which was 'wholly within one State,' with the specified qualification where its subject was going to or coming from a foreign country. * * *

"The question we have now before us, essentially, is whether after the passage of the interstate-commerce act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. * * * Having regard to the terms of the Federal statute, the familiar range of State action at the time it was enacted, the continued exercise of State authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith."

In the Shreveport case the court further discussed the question. Referring to the proviso in section 1 of the act, it said:

"Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the commission to prescribe intrastate rates and thus to establish a unified control by the exercise of rate-making power over both descriptions of traffic. Undoubtedly, in the absence of a finding by the commission of unjust discrimination, intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States." (Houston & Texas Ry. *v.* United States, 234 U. S. 342, 357.)

Thus it was established by clear declaration of the Supreme Court, made in construing the act as it then stood, that Congress had not intended to interfere with State authority to prescribe reasonable intrastate rates, nor to grant to the commission a unified authority over State and intrastate rates, which might be exercised to bring the same to a standard adjudged reasonable by the Federal commission.

What section 3 aimed to require was not the allowance of rates reasonable in amount, but rates nondiscriminatory in their relation to other rates. As to intrastate rates, the commission was given no jurisdiction except upon a showing that, by reason of the difference in scale between intrastate and interstate rates, persons or localities enjoyed or were subject to undue or unreasonable preference or advantage, or unreasonable prejudice or disadvantage. Without exception, we think, save in the case immediately to be noted, the commission, prior to the passage of the transportation act, never ordered the removal of discrimination except upon proof of a discrimination of that character affecting persons or localities.

In a single case the commission did apparently endeavor to stretch its authority. Under evidence tending to show discrimination against two points outside the State, the commission entered an order which seemed to be designed to require an adjust-

ment of all intrastate passenger fares in Illinois upon the same basis as was then in effect for interstate fares between Illinois points and St. Louis and Keokuk, the two points outside the State found to be discriminated against. The interstate rate was 2½ cents, and the State rate 2 cents. In its report of facts found, upon which the order was based, the commission reported that the preference or advantage to intrastate passenger traffic imposed "an unreasonable and unlawful burden on interstate passenger traffic." The commission would appear to have had in mind increasing the revenue derived by carriers from intrastate passenger traffic through the instrumentality of an order ostensibly aimed to remove the discrimination which had been found against St. Louis and Keokuk, the two points in question.

The Supreme Court, however (Illinois Central Railroad Co. *v.* Public Utilities Commission, 245 U. S., 493, 507), refused to interpret the Commission's order as requiring a State-wide readjustment of rates, but attributed to it an intent only to remove the discrimination found, saying:

"The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate passenger rate in Illinois, is addressed to the removal of discrimination found to be State-wide, and gives ample authority for increasing all rates between points in Illinois from 2 cents to 2.4 cents per mile. On the other hand, the State authorities assert that it is not State-wide, and that the extent to which it is intended to affect the State-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them. Of course, the commission could adjust the remedy to the evil and make the order as broad as the wrongful discrimination; and not improbably it would intend to go that far and no farther. But the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the commission, for they constitute the only authoritative evidence of its action. The reports show that the only discrimination found relates to the passenger traffic between Illinois and the two cities outside that State, St. Louis and Keokuk. There is no finding that this traffic extends in appreciable volume to all sections of Illinois. As to some sections its volume may be very large and as to others almost or quite negligible. Obviously this traffic is only a small part of the interstate passenger traffic moving over the railroads in Illinois, and yet the finding is merely that there was discrimination against this part. Had the commission regarded the discrimination as State-wide it is butr eqsonable to believe that it would have said so in its findings. And had it intended to require or authorize a State-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose, which easily could have been done in a few lines. But neither in any part nor as a whole does the order plainly manifest such a purpose. * * *

"The uncertainty arises out of a failure to designate with appropriate precision the territory or points to and from which the intrastate rates must or may be readjusted, and this omission accords with the absence from the reports of any finding showing definitely the territory or points where those rates operate prejudicially against the interstate traffic which the order is intended to protect.

"To be effective in respect of intrastate rates established and maintained under state authority an order of the commission of the kind now under consideration must have a definite field of operation and not leave the territory or points to which it applies uncertain."

The language quoted seems to make it clear that the power of the commission to require an adjustment of State rates, under the law as it then stood, reached no farther than the wrongful discrimination between traffic found to be preferred and that found to be prejudiced. The implication also is clear that such discrimination can be found only as to points between which there is competitive traffic "in appreciable volume." The court simply ignored the finding that the intrastate scale imposed "an unreasonable and unlawful burden on interstate commerce."

This opinion was in harmony with the earlier opinion in American Express Co. *v.* Caldwell (244 U. S., 617, 624). In that case the commission had made an order which the express company had interpreted as giving it authority to make a State-wide readjustment of rates previously prescribed by authority of the State of South Dakota, but the court held that the order was intended to cover merely points on certain lines in the southeastern part of the State, which points were tributary to five cities on said lines, as between which and Sioux City discrimination was found. Mr. Justice Brandeis, giving the opinion of the court, emphasized the fact that the question of reasonableness of rates was not involved in a proceeding to remove discrimination. Upon this point he said:

"Proceedings to remove unjust discriminations are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."

FEDERAL COMMISSION HAS RESTED ITS ORDERS ON SECTION 15-A.

In the first case it decided under the act, the New York case (59 I. C. C.), the variation between State and Federal rates was proved, and a mathematical computation was put in which indicated that, assuming an undiminished movement of intrastate passengers, the carriers would receive between $11,000,000 and $12,000,000 more under the proposed Federal rates than under the Director General's rates, which continued in effect, which were sought to be raised by the proceeding. There was no evidence whatever of injury resulting to any person or community by reason of the difference in rate scales. The commission made the order which you have been told of. I put in the full report the other day. I want to read a part of it, beginning at page 292. Now, if I may, at a later time I will hand to the reporter what I would now read, or I would read it at this time, as the committee would prefer.

The CHAIRMAN. Well, the full report is already in, is it not?

Mr. BENTON. Yes; but I desire, for the convenience of the committee, merely to point out the part of it in which they discussed the requirements of section 15-a.

The CHAIRMAN. Well, read that if you have it before you.

Mr. BENTON. I read from page 292. The commission said [reading]:

"It has not happened heretofore that we have had occasion to make such an extensive exercise of our authority as is now contemplated, and we could not be moved to do so save by the most cogent reasons. Such reasons have been supplied by the situation in which the transportation interests of the country were placed and the action taken by Congress to relieve that situation.

"Our findings in Increased Rates, 1920"—which has been referred to here as Ex parte 74—"were responsive, as the report shows, to legislation enacted by the Congress as part of the transportation act, 1920, approved February 29, 1920, now incorporated in the interstate commerce act as part of section 15-a thereof, paragraphs 2 and 3 reading as follows:

"'(2) In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the commission, are chargeable to capital account."

Then continuing the report the commission say [reading]:

"In accordance with these statutory provisions we designated four rate groups * * * and we authorized increased rates, fares, and charges that were designated to enable the carriers as a whole in that rate group * * * to earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per cent upon the aggregate value of the railway property of such carriers in that group * * *.

"Congress has taken, as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purposes of our report, we included all the railway property of each carrier held for and used in the service of transportation. This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the States and reposed in us. We find nothing in the law to indicate that such was the intent of Congress."

I will interject that those two sentences have always been a puzzle to me in view of what was done here and what has been done in every case that has come before the

Interstate Commerce Commission since, but I have been reading the language of the report, and I now continue [reading]:

"But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue * * *

"The record shows that the refusal of the State of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York."

I want to interject that their finding indicates what I pointed out to you the other day—that is, a disposition to make any finding that will support the jurisdiction of the Interstate Commerce Commission. The evidence was that if there was no diminution of travel by reason of the increased rates they would make $11,000,000 or $12,000,000 difference. The finding was that the failure to increase did in fact make $11,000,000 or $12,000,000 difference, disregarding the knowledge that everybody has that an increase of rates tends to diminish business.

Continuing, the commission say [reading]:

"This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, can not be permitted to await the consideration in detail of individual fares, charges, and rates. The record shows that the respondent carriers perform the services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce."

The CHAIRMAN. Well, now, Mr. Benton, I see nothing at all in what you have read to sustain the claim you made. Now, I can see that if the body of interstate rates is increased that then there might be a discrimination if the State rate were to remain at its former point. But there is nothing in what you have read to indicate that the Interstate Commerce Commission looked, for the power over State rates, to 15-a rather than to 13.

Mr. BENTON. I said the other day that I could not point out a case where they did that. That what they did do was to hitch up 15-a to 13, and that their line of reasoning was that if there was a difference in rates without a difference in conditions, which they found justified it, that——

The CHAIRMAN (interposing). Well, we have established that perfectly that the Interstate Commerce Commission has proceeded in making its order upon the theory that if the State rates were lower than the established interstate rates that discrimination must necessarily be the result.

Mr. BENTON. Yes.

The CHAIRMAN. But that does not confirm your statement that the Interstate Commerce Commission has regarded 15-a as the basis for its authority over State rates. And I am particularly interested in that phase of it.

Mr. BENTON. The Interstate Commerce Commission in its next case, which was the Illinois Passenger case, argued at the same time as the New York case, but decided later, and reported in 59 I. C. C., in a discusion beginning on page 363 and running to page 365, which I will or will not read according as the committee may desire, elaborates the argument and makes it more clear that it is acting by reason of the fact that it finds that the failure of the State commission to make the same percentage advance that the Federal commission had made was a discrimination against interstate commerce within the meaning of section 13, because under the provisions of section 15-a it resulted in an increased burden on interstate commerce. It elaborates the reasoning in the New York case.

The CHAIRMAN. Well, that may be so. I am not familiar with the order to which you refer.

Mr. BENTON. I will, if desired, read from that, beginning at page 363 [reading]:

"From the debates, committee reports, and the act itself Congress evidently concluded that a crisis threatened the transportation of the country. * * * It directed

us to initiate, modify, establish, or adjust rates so that carriers as a whole * * * will * * * earn an aggregate annual net railway operating income equal as nearly as may be to a fair return * * *"

I am trying to omit unnecessary language and merely read that which will interest you. I am not reading the language exactly, but I am reading the words which are necessary to convey their argument [continuing reading]:

"It directed us to take as such fair return for two years beginning March 1, 1920, a sum equal to 5½ per cent * * * and authorized us, in our discretion, to add thereto a sum equal to one-half of 1 per cent * * *

"In our decision in Increased Rates, 1920, we fixed the increases * * *" etc.

They further say [reading]:

"If, without good reason, the fares within a State are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such commerce."

Then they go on, and I read this to show how they slide from the idea of loss to the carrier into a finding of unjust discrimination [continuing reading]:

"We find that there are no conditions within Illinois justifying the maintenance of lower intrastate passenger fares therein than the fares applicable to the interstate transportation of passengers to, from, or through the State; and that the maintenance of such intrastate fares lower than the just and reasonable interstate fares and charges established by the carriers pursuant to Ex parte 74 gives an undue preference and advantage to persons traveling in intrastate commerce in Illinois and subjects persons traveling in interstate commerce to, from, or through the State to unjust prejudice and disadvantage, and unjustly discriminates against interstate commerce; which undue prejudice and unjust discrimination should be removed."

Now the commission discussed the law in those two cases, and in practically every case since, though in the more recent cases they have evidently treated the law as so well established that they need not refer back. They have referred to those two cases for the discussion of the law.

Now in the Louisiana case, which has not yet been referred to here, which is reported in 60 I. C. C., 472, the commission went further than anywhere else. And I will read from page 476 [reading]:

"Counsel for the Louisiana commission objected to the admission of evidence with respect to the reasonableness of rates on sugar cane on the ground that no sugar cane is moved in interstate commerce between points in Louisiana on the one hand and points in any other State on the other hand, 'and that, therefore, there can be no unjust discrimination against this particular traffic as between the rates applicable within the State and any other rates.' Counsel for repsondents, however, contend that there is unjust discrimination gainst interstate commerce by reason of the low basis of rates applicable on sugar cane. It is admitted that there is no discrimination as between intrastate shippers of sugar cane and interstate shippers of the same commodity. There is here no interstate commerce in sugar cane, but it seems manifestly unjust that interstate commerce and interstate shippers should be required to forego the use of needed equipment in order that this particular traffic may be accorded a preference, and that interstate commerce and interstate shippers should be penalized through the medium of necessarily higher interstate rates in order to meet the deficiency in revenue, amply portrayed upon this record, growing out of the preferred treatment of this particular kind of intrastate traffic and this special class of intrastate shippers."

Then the Interstate Commerce Commission, having asserted its jurisdiction, in a sudden fit of generosity—perhaps I ought not to have used the word "sudden," and I do not, said [continuing reading]:

"We can not assume that the Louisiana commission would attempt to require respondents to haul sugar cane under rates that are shown to be less than the cost of service. Under section 13 of the interstate commerce act we are authorized to avail ourselves of the cooperation of the state authorities and, inasmuch as the next season of harvest and transportation will not begin for several months, we shall defer for later consideration the issue with respect to rates on sugar cane."

I ought also to say—what I omitted to say the other day—that in the Arkansas case——

The CHAIRMAN (interposing). Well, Mr. Benton, you know every word that they have said there in the Louisiana case would have been just as applicable to the law as it was before we changed it.

Mr. BENTON. Why, the argument in the Louisiana case was that interstate shippers would have to bear the burden of any charge——

The CHAIRMAN (interposing). No, the idea is that it is a discrimination against interstate commerce.

Mr. BENTON. Yes. Now that is the exact reason, that on this ground we ask to have section 15-a removed, because by reason of its requirement that the Commission produce a certain quantity of revenue it has been argued by the carriers before the Interstate Commerce Commission that that places a burden upon interstate commerce which results in a discrimination, and the commission has accepted that view of it and has expressed it in its reports, and it is entirely a new view which was never expressed before the transportation act with that section in it was passed.

The CHAIRMAN. We will be compelled to suspend now as I have to open the Senate at 11 o'clock. We will take a recess until to-morrow morning at half past nine, in this room.

(Whereupon, at 11 o'clock a. m., an adjournment was taken until Wednesday, November 2, 1921, at 9.30 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

WEDNESDAY, NOVEMBER 2, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will come to order. Mr. Benton, you may proceed.

STATEMENT OF MR. JOHN E. BENTON—Resumed.

Mr. BENTON. Mr. Chairman, we come here this morning for the purpose of completing our presentation upon the several resolutions that were passed by the convention in Atlanta, and that have been put into the record.

Up to this time we have only discussed the first resolution. Nevertheless, I think I can complete what I want to say. I was talking about 15(a) at the last session. I have very little more to say about that. Then if the Senators are disposed to allow me 15 or 20 minutes without interrogation, I think I can put such matter into the record and make such comment upon the other resolutions as I desire, before presenting the concrete amendment which I desire to present and upon which questions will be asked.

The CHAIRMAN. We will endeavor to control ourselves.

Mr. BENTON. I had put into the record discussions from reports of the Interstate Commerce Commission, showing that they found in 15(a) the occasion, and in part, at least, legal justification, in their opinion, for the orders whih have been presented to you here. I said I would present the opinions of courts in which they took the same view. They are before me, and I will read quotations from three Federal courts sustaining those orders.

The CHAIRMAN. The quotations referred to may be read into the record.

Mr. BENTON (reading). "It has now, for the first time, become the duty of the Interstate Commerce Commission to fix interstate rates so that the railroads will receive a specified net rate from their entire business. An injury to a part injures the whole. It seems obvious that if a rate of 3.6 cents upon all the traffic is necessary in order to earn the prescribed net return, action by the State compelling a less rate on intrastate business will in turn compel the imposition of a larger rate than the interstate business, and seems highly probable that each railroad does so much interstate business that it suffers from this burden. The provision in the transportation act fixing this net rate as the basis of interstate rate making, rather than the inherent reasonableness of the interstate rates themselves, and several other provisions of the act, make the situation materially different from that existing when it was held that the forbidden discrimination did not result merely from the existence of State rates so low that the sum of the locals was less than the through rate." (Cincinnati Northern Railroad Company et al *v.* Public Utilities Commission of Ohio, U. S. District Court, Southern District of Ohio.)

"Under the transportation act, * * * the commission is required to modify, establish, or adjust rates for the carriers as a whole or as a whole in each of such groups or territories as the commission shall from time to time designate. The carriers here are included in the eastern group. To permit the New York State law to prevail and the orders of the Public Service Commission of the State of New York to be enforced would create an unjust discrimination of rates between the intrastate rate for New York and the interstate rate which, in turn, would cast a burden upon the interstate commerce of the railroads within this group, resulting in such a rise for maintenance of prices of rates and fares within the eastern group so as to make up the deficiency caused by the lower intrastate rates and fares which the commission

finds is between eleven and twelve million dollars per year." (Railroad Companies v. Public Service Commission of New York, U. S. District Court, Northern District of New York.)

"In addition to the sections which bear directly upon this subject of discriminations against interstate commerce, there are the financial provisions, and there is also the power given to the commission to prescribe the rate which it finds is necessary in order to maintain the revenues that are necessary for the lives of these national carriers. When you look to the financial consideration of the act it is self-evident that the purpose of Congress in authorizing the Interstate Commerce Commission to act, and the purpose of the commission * * * to produce the indispensable revenue would be destroyed, if the State were permitted to allow intrastate passengers to ride upon interstate trains at a lesser compensation. We must assume that the calculations of the Interstate Commerce Commission have been based upon the cost of carrying the passengers, and if a rate is made on a basis of passenger per mile and the intrastate passengers paying a lesser rate, it is casting the direct burden upon interstate commerce and is jeopardizing the power of the national carriers to maintain themselves on the basis which Congress declared they are entitled to maintain." (Railroad Companies v. Railroad Commission of Wisconsin.)

Mr. BENTON. That concludes what I desire to say about the effect of 15(a) as sustaining, or being the cause of the Interstate Commerce Commission's orders in these State cases.

As I said at the outset, the question of safeguarding State power of regulation is entirely separable from the question of a continuance of 15(a). It will be seen, if these opinions of the Interstate Commerce Commission and the courts are read, that they connect them. They all come to the conclusion that Congress intended to put the State rates under the Interstate Commerce Commission for the purpose of controlling the amount of revenue derived from those rates. Unless 15(a) is to have the effect of sustaining the usurpation, as we call it, by the Interstate Commerce Commission of State powers, it will be necessary either to repeal 15(a), or to make such amendments of section 13 as will make it perfectly clear that differences in revenue derived from rates does not, of itself, constitute discrimination.

Now, the other ground upon which the application for repeal of 15(a) by the State commissions was based, as I said at the outset, is the ground that (15(a) has a tendency to increase interstate rates. On that point the resolution speaks for itself. There is little that I have occasion to say this morning. I want to read into the record on that point two paragraphs from the report of the Interstate Commerce Commission in the grain case, 64 I. C. C., 86. The paragraphs I read are from pages 98 and 99 of that report.

The CHAIRMAN. The paragraphs referred to may be read in the record.

Mr. BENTON (reading). "We are to administer, and, so far as possible, give force and life to all the provisions of the interstate commerce act. Section 1 requires that no more than just and reasonable rates for transportation be exacted, and in determining what is just and reasonable it has always been recognized that, among other factors, not only the cost of the service but its value to the user must be considered. In the exercise of our power to prescribe such rates, however, we are now required by section 15(a) to initiate, modify, establish, or adjust rates (as that term is defined in the section) so that carriers as a whole or in designated rate groups will, under proper standards of operation, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

"*It is plainly our duty to do everything in our power to carry out this purpose.* The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15(a), to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers. The rate adjustment can not with advantage be made dependent upon fluctuations in traffic.

"It is also to be noted that the duty cast upon us by section 15(a) is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers, nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return."

It will be noted that the commission, in its report, speaks of the duty existing upon the Interstate Commerce Commission, before the act was passed, to allow just and reasonable rates, and then speaks of the effect of section 15(a). I desire to read in the record some citations from court decisions and discussion of what are unjust and unreasonable rates, considered aside ftom the effect of 15(a); and for that purpose I read two or three pages from an argument which I made before the Interstate Commerce Commission in the grain case.

The CHAIRMAN. It may be read.

Mr. BENTON (reading). "The right to regulate charges to the public for the use of privately owned property devoted to the public service has its roots far back in the common law. Because this case calls only for a correct application of fundamental principles of law to established facts, it will be worth while to spend a few moments' time in examining the nature and extent of the right of public regulation.

"Lord Chief Justice Hale, in 1609, said:

"'If the King or subject have a public wharf, unto which all persons that come to that port must come * * * there can not be taken arbitrary and excessive duties, * * * neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate.'

"By act of Parliament (3 William and Mary, chap. 12, Sec. XXIV), in 1691, it was provided:

"'And whereas divers waggoners * * * have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade,' etc.

"The leading case on this subject in this country, as you all know, was Munn *v.* Illinois. I will not stop to read you the cases showing how the constitutional rule against confiscation finally took form and come to operate as a limitation upon the legislative power. It is only necessary to guard against a misapprehension of the effect of the constitutional limitation.

"That limitation does not secure to the private owners of property devoted to public use immunity from regulation of rates at all times, except when the rates to be regulated yield more than a fair return. Unreasonable rates may not be charged, even though they would yield no more than a reasonable return upon the portion of the property devoted to the service for which they are sought to be imposed.

"The right to earn a return is a private right, protected by the Constitution, but exercised subject to the dominant right of the public to enjoy the use of the property at a rate not in excess of the value of the service rendered.

"The Supreme Court made this declaration clearly in the Covington Turnpike Co. case, 164 U. S., when it said:

"'The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit too unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable.'

'These words were repeated in the very case in which the fair value rule was established, Smyth *v.* Ames, and the court added:

"'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'

"Sometimes sentences that are full of meaning are so familiar to us that we fail to comprehend their most obvious import. I want to direct your attention to the concluding words of the quotation which I have just read: 'What the public is entitled to demand.' Rates not exceeding the worth of the service are not merely something which the carriers may grant, nor even merely something which they ought to grant, but can not be compelled to grant—they are, in the words of the court, 'what the public has a right to demand.' Whatever the public has a right to demand, it is the right and the power and the duty of this commission to require.

"It is a sovereign right, exercised now, as it was in 1691, in the words of that ancient statute, to prevent 'injury to trade.' It springs from the public nature of the property. When property is once devoted to public purposes, though it may remain privately owned, the public right becomes dominant. It can not be withdrawn directly and wholly from public use without the consent of the sovereign. Neither can it be so withdrawn indirectly by the imposition of charges on any class of traffic

which exceed the worth of the service, and, either suddenly or gradually, compel a cessation of that kind of traffic."

Mr. BENTON. Now, in the Wisconsin Rate case, a brief was filed by myself and by the attorneys general and rate counsel of approximately 20 States, which were the States then involved in rate litigation. Other States have since been added. In that brief the question of the constitutionality of section 15(a) was discussed, and a decision by former Justice Hughes was quoted. I would like to read at this point three or four pages from that brief.

The CHAIRMAN. It may be read into the record.

Mr. BENTON (reading):

BRIEF FILED AMICI CURIAE ON BEHALF OF FORTY-TWO STATES BY THE ATTORNEYS GENERAL AND OTHER COUNSEL AND BY THEIR RAILWAY AND UTILITIES COMMISSIONS.

In the Supreme Court of the United States. October Term, 1920. No. 694. Railroad Commission of Wisconsin, Appellants, *v.* Chicago, Burlington & Quincy Railroad Co., Appellee.

W. J. Galbraith, attorney general of Arizona; J. S. Utley, attorney general of Arkansas; James E. Calkins, commerce counsel, Florida; R. A. Denny, attorney general of Georgia; James K. Hines, special counsel, Georgia; Edward J. Brundage, attorney general of Illinois; James H. Wilkerson, assistant attorney general of Illinois; Norton T. Culver, assistant attorney general of Illinois; Ben. J. Gibson, attorney general of Iowa; J. H. Henderson, commerce counsel, Iowa; U. S. Lesh, attorney general of Indiana; A. B. Cronk, commerce counsel, Indiana; R. J. Hopkins, attorney general of Kansas; A. E. Helm, commerce counsel, Kansas; W. M. Barrow, assistant attorney general of Louisiana; Merlin Wiley, attorney general of Michigan; Jesse W. Barrett, attorney general of Missouri; Wellington K. Rakin, attorney general of Montana; E. G. Toomey, commerce counsel, Montana; Hugh LaMaster, assistant attorney general of Nebraska; Leonard B. Fowler, attorney general of Nevada; Charles D. Newton, attorney general of New York; Deputy Attorney General Edward G. Griffin, of New York; Deputy Attorney General George L. Meade, of New York; James S. Manning, attorney general of North Carolina; William Lempke, attorney general of North Dakota; John G. Price, attorney general of Ohio; E. E. Corn, commerce counsel, Ohio; Samuel M. Wolfe, attorney general of South Carolina; Morris C. Lumpkin, commerce counsel, South Carolina; O. E. Sweet, assistant attorney general of South Dakota; C. M. Cureton, attorney General of Texas; Harvey H. Cluff, attorney general of Utah, of counsel.

John E. Benton, general solicitor, National Association Railway and Utilities Commissions.

PRELIMINARY.

The State officials, parties to this brief, filing the same by leave of court, do so amici curiae only, except the Railroad Commission of Wisconsin. It is perhaps fitting that they should at the outset state the reasons which impel them to file it.

INTEREST OF ATTORNEYS GENERAL AND OTHER STATE COUNSEL.

The attorneys general and other State counsel represent all of the States to which the Interstate Commerce Commission has yet given notice of proceedings looking toward orders advancing intrastate rates. Their reasons for filing this brief may be shown by including a statement issued by them at a conference in Washington, D. C., February 16–17, 1921, at which they determined to ask leave to file the same. The statement follows:

"The attorneys general and other State counsel severally represent States whose sovereign rights to regulate their own internal commerce, and the rates and charges imposed upon the public for transportation of the same, have been already invaded, or are now threatened with invasion, under the transportation act of 1920. It is their duty to enforce the laws of their respective States, and to protect their peoples in the enjoyment of those rights and powers which were reserved to each State under the Federal Constitution.

"They believe that the transportation act of 1920, under which the Interstate Commerce Commission claims to exercise power to set aside State statutes, and orders, rules, and regulations in force under State laws, ought to be declared unconstitutional for the following among other reasons:

"1. As construed by the commission, it is destructive of our dual form of government and contrary to the spirit of our institutions. From the very formation of the Government there has been no question as to the constitutional right of the people

of the several States to control purely intrastate traffic. This principle was upheld by John Marshall and has been uniformly admitted by all the courts of the United States to this time. The construction placed upon the transportation act, if sustained by the Supreme Court in the Wisconsin case, will overturn this established principle of constitutional law, and will centralize in a body of 11 men sitting in Washington power over the entire commerce of the United States, both interstate and intrastate.

"2. It prescribes a fixed return on railroad capital regardless of business conditions. Under such a law, if prices fall and traffic grows less, railroad rates increase. The commission is commanded to make rates that will yield a fixed return without regard to the value of the transportation service rendered. This is not only economically unsound, but it is violative of fundamental law.

"3. It commands the commission under the group plan to fix an aggregate value and make rates that will yield in the aggregate the fixed return thereon. The worthless roads of the country, ill-considered ventures, duplicated lines, speculative enterprsise, roads that have served their useful purpose and outlived the industries which once justified their construction—roads that perform no sufficiently useful service in the actual movement of traffic to enable them to earn—are valued with the good, and the roads that can earn, because they are the highways of commerce and traffic, must move over them, if it moves at all, regardless of the rate imposed, are given by this law the right to earn on their own value and the value attributed to other roads as well. In the exact words of the act, this will enable such carriers 'to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property.' One-half of the unreasonable excess is to be taken by the Government, to be loaned to carriers or expended for equipment to be leased to them. The half that the Government thus takes is an unjust tax to be expended for a selected class. The half that carriers are permitted to keep is in excess of the fair return they are entitled to by the common law. Both the half which nominally goes to the Government and the half which the carriers keep represent an excess burden laid on shippers, whose right to a fair rate under the Constitution is equal to the carrier's right to a fair return on its property. Because the law aims to compel the commission to disregard this right it violates again the fundamental law.

"For these and other reasons the public officials, parties hereto, deem it their duty, in the first case to come before the United States Supreme Court involving the transportation act, to challenge both the construction which the commission has placed upon the act and its constitutionality as well.

"OPINION OF FORMER JUSTICE HUGHES.

"The right to receive transportation upon the payment of just and reasonable charges is a property right, and any statute which imposes transportation charges which are 'substantially and unreasonably in excess of a fair return upon the value' of property devoted to the purpose of such transportation, operates to take property without due process of law.

"This point was discussed by former Justice Hughes in an opinion filed with the House committee during the hearings on H. R. 4378. It appears that the committee then had before it the plan contained in S. 2906, in its original form, set out at page 103 of this brief. It was the proposal of that plan to distribute earnings of carriers in excess of a fair return, which some carriers were to be permitted to earn under that plan in the same manner as under section 15 (a) partly to carriers that earned less than a fair return, and partly to a fund to be used for the benefit of railway employees. So far as rates imposed on shippers were concerned, the plan under discussion in the memorandum was the same as now in section 15 (a).

"Concerning the constitutionality of such plan, from the point of view of shippers and passengers over lines to be permitted to earn an unreasonable return, the opinion was in part as follows:

"Assuming that it is the intent of the provision that the rates producing the 'excess' earnings in the case of a particular carrier are to be deemed to be unreasonable as to that carrier, there is manifestly a question beyond that of the right of that carrier to complain. * * * Manifestly, in such case, the question of the validity of such a provision in the exercise of the regulating power is not exhausted by the mere consideration of what amounts to confiscation of the carrier's property. Unreasonable rates constitute an unjust exaction from shippers or passengers. The rates maintained by Congress, or under its authority, in the exercise of its power of regulation of interstate commerce, are lawful because deemed to be reasonable, a presumption which the courts entertain, so long as the rates lie within the range of legislative discretion. But if we proceed on the assumption that the rates which are actually charged are ex-

tortionate, it would appear to be an abuse of the regulating power of Congress to enforce them. Congress, it may be said, could not, under the guise of regulating interstate commerce, compel shippers or passengers to pay confessedly extortionate charges for the services rendered. On the hypothesis that the charges are unreasonable, the power to authorize them, no less than the power to collect them, falls. The exaction and maintenance of such charges would deprive shippers and passengers of their property without due process of law." (House Hearings, p. 2985.)

Mr. BENTON. Now, it has been suggested that the unjust and unreasonable amounts that will be received by some carriers under the group plan of rate making may be diverted to the weaker lines through divisions. I point out that the right to make divisions does not depend upon 15 (a); that just divisions can be established and rates can be fixed upon the basis of what just divisions ought to be without 15(a). But I would like to call attention in the briefest way possible——

The CHAIRMAN (interposing). I must interrupt just a moment. You are speaking now of that phase or that part of 15(a) which permits group rates?

Mr. BENTON. Yes, sir.

The CHAIRMAN. Very well; you may go on.

Mr. BENTON. I want to call attention to the fact that under the law as it stands now, as the Interstate Commerce Commission is interpreting and applying it, that seems not to be possible. I refer to the New England divisions case, and I ask to put into the record a bulletin which I sent out to the State commissions when that opinion was first handed down by the Interstate Commerce Commission. It is a bulletin covering only four pages, and all but three short paragraphs of the same are made up of quotations from the report of the Interstate Commerce Commission and dissenting reports. I will ask to have that incorporated in my statement.

The CHAIRMAN. It may go in.

(The bulletin referred to is as follows:)

BULLETIN NO. 57, 1921.

NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS,
NEW ENGLAND DIVISIONS,
Washington, D. C., July 29, 1921.

To the STATE COMMISSIONS:

The report of the Interstate Commerce Commission in the New England divisions case was made public yesterday. Except perhaps the first intrastate rate case, this is, I believe, the most important decision rendered by the commission since the transportation act was passed. I have been unable to secure a sufficient number of copies of the report to supply all commissions. I mailed a copy yesterday to the chairman of each New England commission, and I am herewith sending a copy to each of the commissions in official classification territory. I hope to obtain other copies to distribute to other commissions within a few days.

In this case the New England lines, relying on paragraph (6) of section 15 of the interstate commerce act, as amended by the transportation act, sought to procure an order of the commission increasing their divisions of joint rates. Extended hearings were held. The case was submitted April 23, 1921, and the commission's report bears date of July 6, 1921. The following is quoted from the majority report:

"CLARK, *Chairman:* * * * We think that there is merit in the allegations of defendants that the proceeding is, in substance, an effort on the part of complainants to augment their revenues from traffic which they interchange with their connections without regard to the question of whether the present divisions of the various joint rates are fair and reasonable or consideration of the probable effects upon the revenues of the respective defendants. The proceeding is essentially an outgrowth of Ex parte 74. It is contended for complainants that our decision in that proceeding operated to the relative disadvantage of the New England lines because their inclusion in the eastern group gave them less additional revenue and defendants more than might otherwise have been received and because of the difference in the percentage increases authorized for freight and passenger traffic, respectively, the lower percentage of increase having been authorized for passenger traffic, which is, generally speaking, relatively greater on complainants' lines than on the lines of defendants. * * *

"The public interest does not demand nor does the statute either expressly or by reasonable implication provide that we may prescribe increased divisions of joint rates, fares, and charges to be received by certain carriers merely because other carriers participating in the joint rates, fares, or charges, considered as a whole, have not failed in so great a degree to earn a fair return upon the value of their property

devoted to the public service, although this is one factor which may be taken into consideration. * * *

"It is submitted for complainants that 'the New England lines are entitled to divisions of 33⅓ per cent in excess of what they now receive," notwithstanding admissions that divisions of certain joint rates now received by complainants are reasonable and equitable and that the present blocking of divisions in New England is a 'mess of inconsistencies' and must be almost entirely rebuilt. No evidence of the reasonable and equitable measure of divisions other than 'as a whole' has been offered. No method by which the apparently incongruous plan of divisions now in force might be readjusted has been submitted, and we are thus left to deal with the situation in the light of generalizations which can lead only to speculative ventures upon an unknown field. * * *

"However, the record lays before us an existing condition of divisional arrangements which is the antithesis of equality, uniformity, system, or order. A plan of transportation practices so fraught with incongruities and from which, as indicated by one of counsel, anything might be proved by a judicious selection of items, is indefensible. While the record affords no foundation upon which might rest a valid prescription by us of divisions, we can not disregard the conditions portrayed. Our duty would not be fully performed if we did not require a readjustment under which the conditions shall be relieved and demonstrably fair treatment accorded to all parties with respect to individual divisions."

The record is held open and carriers are required to submit proposed readjustments. The following is from the dissenting reports:

"EASTMAN, *Commissioner*, dissenting: Throughout the majority report runs the criticism that complainants ask revision of their divisions 'as a whole.' The thought is that the law requires us to attack the problem atom by atom, withholding action until we have the necessary evidence to analyze separately the many thousands of joint rates and determine finally their just and equitable divisions. I am unable to accept this view of our power and duty. * * * It was, I believe, the intent of Congress to provide for the transportation needs of the country and to confer upon us all necessary power to that end. * * *

"The critical financial condition of the New England roads, in which the United States has an investment of some $125,000,000, is a matter of common knowledge. For some months they have been failing to earn fixed charges. It is at least possible that only some measure of success in this proceeding will save certain of these carriers from serious financial trouble. * * * Certain matters apart from mileage haul are specified which we must consider in fixing divisions. Out of the four so specified, two are as follows:

"The amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation.

"The importance to the public of the transportation services of such carrier.

"If the fair measure of divisions were merely the amount and cost of the service rendered by the respective carriers, it is clear that neither of these matters would be relevant or material. Our problem would be to take a given joint rate, compare what each participating carrier contributes in the way of service and cost, and divide the rate accordingly. The fact that one carrier might be rich and another poor would have not the slightest bearing upon the ascertainment, nor would the importance to the public of the transportation service of any carrier. It follows that we can attach no weight to these matters which have been given so much prominence in the law unless we are prepared to accept the conclusion that in some cases it may be just and equitable and in the public interest to divide joint rates in disproportion to the amount and cost of the service rendered. * * *

"A second vital question of law is whether we have authority to make a temporary adjustment of divisions pending a further and more detailed consideration of the problem which they present, consuming many months of time. I take it that the majority believe that we have no such authority, but here I also feel that their view of the law is unduly narrow. As already indicated, we combine judicial and administrative functions and are really custodians of the national transportation interests. It is good administration to act quickly when the public interest demands, upon the best evidence available, even if we know that readjustments may be necessary before the problem under consideration is finally put to rest. * * * This is precisely what we have done in the administration of our powers over rates. * * *

"I know of no reason why a similar policy should not be followed in the case of divisions. Surely we are not called upon to withhold general remedial action for fear of possible injustice to carriers in specific cases, when we do not withhold such action for fear of possible injustice to individual shippers. * * *

"Coming, then, to the crux of the problem, I believe that it has been shown that the New England carriers are justly entitled to some measure of immediate relief pending further and more detailed inquiry."

"POTTER, *Commissioner*, dissenting: I can not concur in the majority report, which seems to me needlessly to concede the futility of the transportation act and the impotence of the commission to remove injustice. I concur generally in the views expressed by Commissioner Eastman, but desire to amplify the reasons, as I see them, for adopting his conclusions. * * *

"We are charged with the duty of inforcing correct adjustments between carriers in their joint relation and of requiring the application of the rule of right instead of power. We must see that through rates are fairly divided, and we must find a way to bring this about. We are not a court to dismiss for want of proof. We must ascertain the facts, and we have all necessary means. We must correct injustice when and where we find it and as we can. With one accord we have condemned the existing adjustment. We should now correct it. * * *

"The value of the New England lines was considered and included by us in Ex parte 74 in determining the aggregate amount to be paid by shippers for the use of the group transportation machine. The low earnings of the New England lines were considered in determining the amount of additional income to be raised to make up the required aggregate compensation. The shippers are now paying on the basis of value of the New England lines and as compensation for their use. After including the value of these lines, to determine the aggregate amount to be raised as compensation for all of the lines in the group, we translated this amount into a percentage rate increase on all traffic moving within all parts of the group. The effect of this action by us was because of the difference in traffic density, to transfer to the other lines, a part of the compensation which, under the statute, was to be raised and which we started out to raise, for the New England lines. It is now our duty to correct this unsound result and direct these earnings back to the New England lines, where they belong under the statute and by virtue of our action which created them. To do less is not only to perpetuate gross injustice but to sanction a result which, it seems to me, is not in harmony with the spirit of the law. As I see it we are not asked to give to the New England lines something that belongs to the others, but to end a misappropriation in violation of law, by the other lines, of funds that belong to the New England lines.

"In fairness and justice the burdens of all carriers participating in through traffic, including a fair return to their owners upon their respective investments, should be considered in making an equitable division of the returns from their joint activities. The transportation act embodies these rules of simple justice. This act, recognizing that in the last analysis all enterprises involve only dealings between individuals and their relations to one another, requires that the rules of common fairness as between man and man shall be applied by railway public service corporations. We are the Nation's agency to enforce these rules. Acting in the Nation's power, we should not say we can not. I have so valued the transportation act, and have had such high hopes that I can not adopt the majority conception of our power and duty."

"CAMPBELL, *Commissioner*, dissenting: I find myself in accord with the dissenting opinion of Commissioner Eastman. It seems to me that subdivision (6) of section 15 is clearly intended to cover just such a situation as exists in New England. The transportation act, 1920, gave to the commission power and authority to group railroads into sections for rate-making purposes. It must of necessity follow that where rates are made by groups that some roads must receive larger returns than others. It must follow that there will be a great difference in 'the amount of revenue required to pay their respective operating expenses, taxes,' etc. It must have been in the minds of the legislators that rate making by groups would have that effect, that it would fatten some roads and have a tendency toward starving others in the same group. Now, I further believe that the legislators intended the act of 1920 to be administered in such a manner as to perpetuate private ownership and to provide a means whereby the commission could sustain the weaker road, which obviously is the road which requires the aid more than the strong and vigorous line, and therefore and for that purpose subdivision (6) of section 15 was enacted in which the commission is required when considering divisions to take into consideration things which never have been taken into consideration before. It seems to me that the act is very specific, and a careful reading of it must convince one that Congress had this very thought in mind. * * *

"I am authorized by Commissioner McChord to say that he shares in these views."

COMMENT.

Unless the view expressed in these dissenting reports is to prevail, I am at a loss to understand what legitimate reason can be urged against the immediate repeal of section 15(a). It is scarcely to be believed that the people of this country will be content that fortunately located carriers, moving traffic sufficient to enable them to earn returns under 15(a) rates not only upon their own value, but on the value of less fortunately located carriers, shall be permanently permitted under that section to earn returns on the value of such other roads, and, to use Commissioner Potter's expressive word, "misappropriate" the same to their own use. If the majority of the commission, as Commissioner Potter says, "concede the futility of the transportation act," it would seem probable that Congress will be prepared to make the same concession.

JOHN E. BENTON,
General Solicitor.

Mr. BENTON. Now, I had intended to refer to each of the cases that have been before the Interstate Commerce Commission involving State rates, calling attention to any particular features. Time does not permit that. I accordingly ask to read at this point a portion of a report made to the National Association of Railway and Utilities Commissions by the committee on litigation at the Atlanta convention. I will eliminate all of the report except what refers to State cases; and a very brief synopsis of those cases, or summary of them, is contained therein. I would like to read this as a part of my statement.

The CHAIRMAN. It may be read.

Mr. BENTON (reading):

REPORT OF COMMITTEE ON LITIGATION, 1921.

To the National Association of Railway and Utilities Commissioners at its annual convention, Atlanta, Ga., October 11-14, 1921:

ORDERS OF FEDERAL COMMISSION.

The year has been prolific of litigation begun to set aside intrastate rates. The result of the same is familiar to all in a general way. The following summary statement of the orders of the commission may be made:

New York Fares and Charges (59 I. C. C., 290), decided November 13, 1920. A blanket order increasing intrastate passenger fares, baggage charges, milk and cream rates, and imposing Pullman surcharges on all lines in New York.

Illinois Rates, Fares, and Charges (59 I. C. C., 350), decided November 13, 1920. A blanket order increasing intrastate passenger fares and imposing Pullman surcharges on all lines in Illinois.

Wisonsin Passenger Fares (59 I. C. C., 391), decided November 27, 1920. A blanket order increasing intrastate passenger fares and imposing Pullman surcharges on all lines in Wisconsin.

Arkansas Rates and Fares (59 I. C. C., 471), decided December 6, 1920. A blanket order increasing intrastate passenger fares and baggage charges on all lines in Arkansas.

Minnesota Fares and Charges (59 I. C. C., 502), decided December 8, 1920. A blanket order increasing intrastate passenger fares and excess-baggage charges on all lines in Minnesota.

Iowa Passenger Fares (60 I. C. C., 55), decided January 11, 1921. A blanket order increasing intrastate passenger fares and imposing Pullman surcharges on all lines in Iowa.

Montana Rates and Fares (60 I. C. C., 61), decided January 11, 1921. A blanket order increasing intrastate passenger fares and excess-baggage charges and imposing Pullman surcharges on all lines in Montana.

Ohio Rates, Fares, and Charges (60 I. C. C., 78), decided January 10, 1921. A blanket order increasing intrastate passenger fares, baggage charges, milk and cream rates, and imposing Pullman surcharges on all lines in Ohio.

Illinois Freight Rates (60 I. C. C., 82), decided January 11, 1921. A blanket order increasing intrastate freight rates on all lines in Illinois.

Michigan Passenger Fares (60 I. C. C., 245), decided January 28, 1921. A blanket order increasing intrastate passenger fares and imposing Pullman surcharges on all lines in Michigan.

South Carolina Fares and Charges (60 I. C. C., 290), decided January 28, 1921. A blanket order increasing intrastate passenger fares and imposing minimum passenger

fares and a conductor's cash penalty charge, and minimum baggage allowances, and increasing charges for switching in connection with intrastate-line hauls.

Nebraska Rates, Fares, and Charges (60 I. C. C., 305), decided January 27, 1921. A blanket order increasing intrastate passenger fares and all freight rates on all lines in Nebraska.

Indiana Rates, Fares, and Charges (60 I. C. C., 337), decided January 28, 1921. A blanket order increasing intrastate passenger fares, excess baggage charges and milk and cream rates, and imposing Pullman surcharge and advancing all freight rates on all lines in Indiana, except certain coal rates.

North Carolina Fares and Charges (60 I. C. C., 362), decided February 12, 1921. A blanket order increasing intrastate passenger fares and imposing minimum passenger fares and a conductor's cash penalty charge and minimum baggage allowances on all lines in North Carolina.

Utah Fares and Charges (60 I. C. C., 388), decided February 12, 1921. A blanket order increasing intrastate passenger fares on all lines in Utah.

Texas Intrastate Rates (60 I. C. C., 421), decided February 12, 1921. A blanket order increasing intrastate passenger fares, imposing Pullman surcharges, and advancing milk and cream rates, and all freight rates on all lines in Texas.

Louisiana Rates, Fares, and Charges (60 I. C. C., 467), decided February 15, 1921. A blanket order increasing intrastate passenger fares, imposing Pullman surcharges, and advancing rates on milk on various lines in said State. The jurisdiction of the commission was also asserted over intrastate rates on sand and gravel and sugar cane, but its exercise with respect thereto was withheld pending such changes in those rates as the State commission might make.

Georgia Rates, Fares, and Charges (60 I. C. C., 527), decided March 8, 1921. A blanket order advancing freight rates on cotton, cotton linters, and brick on all lines in Georgia.

Florida Rates, Fares, and Charges (60 I. C. C., 551), decided March 8, 1921. A blanket order advancing all freight rates in Florida which under Florida classification and rules level had been increased a less percentage than interstate rates under the commission's decision in Ex parte 74.

William Wylie Beall *v.* Wheeling Traction Co. (60 I. C. C., 600), decided March 5, 1921. Advanced certain fares fixed by municipal franchises in Ohio on certain electric railway lines operated by the Wheeling company.

Nevada Rates, Fares, and Charges (60 I. C. C., 623), decided March 8, 1921. A blanket order increasing intrastate passenger fares, excess baggage charges, rates on milk and cream, and imposing Pullman surcharges, and advancing all freight rates on all lines in Nevada.

North Dakota Rates, Fares, and Charges (61 I. C. C., 504), decided May 3, 1921. A blanket order increasing intrastate passenger fares, excess baggage charges, rates on milk and cream, and imposing Pullman surcharges, and advancing all freight rates on all lines in North Dakota.

Arizona Rates, Fares and Charges (61 I. C. C., 572), decided May 3, 1921. A blanket order increasing intrastate passenger fares, excess baggage charges, imposing Pullman surcharges, and advancing all freight rates on all lines in Arizona, except rates on ore, flux, milk, and cream, sand, gravel, crushed rock, and live stock.

Surcharge for Transportation of Passengers in Sleeping or Parlor Cars in Alabama (62 I. C. C., 153), decided June 14, 1921. A blanket order imposing Pullman surcharges on all lines in Alabama.

Intrastate Fares of the Chicago, North Shore & Milwaukee Railroad in Illinois (62 I. C. C., 188), decided June 14, 1921. A blanket order advancing all passenger fares on the respondent line in Illinois.

Kansas Rates, Fares, and Charges (62 I. C. C., 440), decided July 6, 1921. A blanket order increasing passenger fares, excess baggage charges, and milk and cream rates, and all freight rates except petroleum, crude, fuel, road and gas oils, petroleum asphalt and petroleum wax tailings, and advancing interurban passenger fares on certain lines in said State.

CASES PENDING.

On the date of the preparation of this report (Aug. —, 1921) there are pending proceedings to advance freight rates on certain commodities in the States of Tennessee and Missouri; and all rates, passenger and freight, on all lines in Oklahoma; Pullman rates in Louisiana; express rates in California, Georgia, Texas, South Dakota, North Dakota, Arkansas; and electric rates on certain lines in Ohio.

EFFECT OF FEDERAL COMMISSION'S ORDERS.

The effect of the decisions of the commission, to which we have made reference, may be summarily stated as follows:

The prohibition against "undue, unreasonable, or unjust discrimination against interstate or foreign commerce" is not limited to particular persons or localities, but is applicable to such discrimination against interstate or foreign commerce in their broad definitions. (Illinois Passenger Fare Case, 59 I. C. C., 363.)

The term "commerce" covers the entire field of transportation—the traffic itself and all the instrumentalities and means of carrying it on. The language used is certainly broad enough to cover every discrimination growing out of the relation between intrastate and interstate commerce which injuriously affects the latter. (Illinois Passenger Fare Case, 59 I. C. C., 361.)

If, without good reason, the fares within a State are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such commerce. (In the Matter of Intrastate Rates within the State of Illinois, 59 I. C. C., 365.)

Whenever a carrier believes that an intrastate rate is too low, from a revenue standpoint, it may apply in the first instance to the Federal commission for an order advancing the same, disregarding any State agency having jurisdiction over the rate under State laws. (Arkansas Rates and Fares, 59 I. C. C., 473; Nevada Rates, Fares, and Charges, 61 I. C. C., 573.)

It is no defense in such a proceeding that the intrastate rates yield a fair return on the value of property devoted to intrastate transportation. The law does not contemplate any segregation of such property and consideration of earnings thereon. (In the Matter of Intrastate Rates Within the State of Illinois, 59 I. C. C., 364.)

It is no defense that the interstate and intrastate business taken together, in the State involved, yield the aggregate return contemplated by the transportation act upon the aggregate value of railroad property within such State. Section 15(a), in its provision for group rates and aggregate returns, contemplates the disregard of State lines. (Nebraska Rates, Fares, and Charges, 60 I. C. C., 312; and in the Matter of Intrastate Rates within the State of Texas, 60 I. C. C., 426.)

In order that the commission may act quickly, when it deems carriers' need of increased revenue urgent, it may increase specified classes of rates by straight percentage increases, without examination of particular rates, leaving persons aggrieved to secure modification of the commission's order after it has become effective. (In the Matter of Rates, Fares, and Charges of the New York Central Railroad Co. and other Railroad Companies in the State of New York, 59 I. C. C., 294.)

In order that the Federal commission may exercise jurisdiction to advance intrastate rates on any commodity, as discriminatory against interstate commerce, it is not necessary that there be any interstate commerce in such commodity. In such case the Federal jurisdiction rests upon the loss in revenue suffered by the interstate carrier. (Louisiana decision on sugar cane rates, 60 I. C. C., 476.)

The question whether a rate or practice sought to be changed is "unjustly discriminatory against interstate commerce does not depend upon the amount of revenue involved," and the commission may accordingly advance intrastate rates prescribed by State authority, even when it is found that the advance will have "no very substantial effect upon the revenues of any one carrier," as in the case of the increase of minimum passenger fares in South Carolina. (60 I. C. C., 298.)

Furthermore, the commission has jurisdiction to impose charges with respect to intrastate traffic, in contravention of State law, which charges are not designed for direct revenue purposes, such as the conductor's case penalty charge imposed in South Carolina. (60 I. C. C., 298.)

Paragraph (4) of section 13 of the interstate commerce act, as amended by the transportation act, provides that any rate or practice ordered by the commission "shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the order of any State authority to the contrary notwithstanding." All orders of the commission thus far made, prescribing State rates, have provided that the same shall "remain in force until the further order of the commission."

From the first, the commission has proceeded under the transportation act, not upon investigation of particular rates, but with respect to large bodies of rates. It will have been noted, from the statement of orders heretofore made, that in several instances the commission has advanced all of the freight rates within a State, and in other instances all of the passenger fares (with inconspicuous exceptions, such as

commutation rates, too unimportant to mention), and that in some instances all rates within a State, both passenger and freight, have been advanced. This it has done, without examination of the rates increased by the application of the same percentages of increase which were applied to interstate rates under the authority of the commission's decision in Ex parte 74. The result has been that many situations were created where intrastate rates were so glaringly in excess of interstate rates that the carriers themselves desired to make adjustments. This they could not do without first securing a modification of the applicable order of the Federal commission.

To remedy these situations, the Federal commission designed a provision which, by amendment, or by original inclusion, has been a part of each order of the commission advancing intrastate rates, the same being as follows:

It is further ordered that nothing in this order shall be construed as requiring any common carrier to establish, put in force, or maintain any rate, fare, or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare, or charge applicable to the transportation of passengers or property in interstate commerce from, to, or at the same points in effect on (the date of the order) or greater than its corresponding rate, fare, or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce.

Whatever may be the meaning of the peculiar language "from, to, or at the same points in effect * * * or greater than its corresponding rate, fare, or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce," it is treated as permitting carriers to reduce the percentage of their intrastate advances, when they desire to do so, to avoid or remove maladjustments which would otherwise result from an order.

Reference has been made to this device as a necessary preliminary to a statement of the extreme length to which the Federal commission has gone in its order aimed to exempt carriers from the obligation to conform to State rates prescribed by State laws.

In the Kansas case it was shown affimatively, upon the hearing before the Federal commission, that without increases the Kansas freight rates were already, in large part, as high as interstate rates. Nevertheless, the Ex parte 74 percentage advance was ordered, with the proviso in the order just quoted, under which it was said "difficulties of the kind referred to can be avoided." (Kansas Rates, Fares, and Charges, 62 I. C. C., 448, 450.)

The effect of this order is that the Federal commission, as to the entire body of Kansas intrastate freight rates, said to the carrier: "We find that these rates are in part lower than corresponding interstate rates. You may accordingly determine what rates are in fact lower than corresponding interstate rates, and may advance those rates such percentage as you may determine to be necessary to bring them to a parity with corresponding interstate rates, not, however, exceeding the percentage advance authorized as to interstate rates in Ex parte 74."

In other words, the commission in effect authorized the Kansas carriers to determine what intrastate rates in Kansas were discriminatory, and to advance the same by such a percentage as such carriers determined to be necessary to remove the discrimination.

It is difficult to conceive of a more complete destruction of State power of regulation than is represented by these several orders of the commission to which we have referred, if those orders are valid.

It should be noted that from these orders (with the exception of the Chicago, North Shore & Milwaukee case) Commissioner Eastman has dissented. In the Kansas case the newly appointed commissioners, Campbell and Lewis, also dissented, the first upon the ground that the Federal commission has no jurisdiction under the transportation act to review the reasonableness of State rates, and the latter upon the ground that the fact of discrimination must be found by the commission itself before it can properly make an order advancing an intrastate rate.

WILLIAM WYLIE BEALL *v.* WHEELING TRACTION CO.

Another case involving the power of the State commission was that of William Wylie Beall *v.* Wheeling Traction Co. (60 I. C. C. 600), of which mention has already been made.

This case involved franchise rates on certain lines of street railway in Ohio. The commission's decision in the steam railroad rate cases, heretofore discussed, were

supported, in part at least, by argument that the provisions in section 15(a) of the interstate commerce act, relating to the rate of aggregate return on aggregate value, operate to require the Federal commission to adjust rates in such a manner as to produce a prescribed rate of return, and that accordingly any deficit from intrastate business, resulting from inadequate rates, will necessarily impose a burden upon interstate commerce. Hence it was held that inadequate rates were discriminatory. In the William Wylie Beall case the commission made an order advancing the franchise rates. The report of the commission contained little discussion of jurisdictional questions, but it appeared evident from the facts found that the order rested upon the conclusion of the commission that the intrastate rates were unreasonably low. The fact that section 15(a) expressly excluded street and interurban electric railways from its effect was disregarded—or at least not discussed..

Acting under our authority the general solicitor filed a motion for rehearing. The same was granted, and reargument was held, in which the general solicitor represented this association. At the time of the preparation of this report no further action has been taken by the commission. The importance of the case can scarcely be overstated. We have already pointed out the extent to which the jurisdiction of the Federal commission over steam-railroad rates operates to destroy State power of regulation, assuming the validity of the orders which have been made. It is evident that if the Federal commission has like jurisdiction as to electric railroads the like effect will follow as to State regulation of the rates of such carriers.

By the committee.

FRED W. PUTNAM, *Minnesota, Chairman.*
DWIGHT N. LEWIS, *Iowa.*
W. D. B. AINEY, *Pennsylvania.*
ALLISON MAYFIELD, *Texas.*
JOHN F. O'RYAN, *New York.*
JNA. A. KURTY, *Missouri.*
R. HUDSON BURR, *Florida.*

Mr. BENTON. I had intended also to make reference to some cases that are now pending before the Interstate Commerce Commission. Time does not permit me at this point to do that.

Commissioner Webster, of Iowa, referred to the Iowa hog case, where the Interstate Commerce Commission is proceeding to review the order of the Iowa commission fixing the minimum rate on Iowa hog shipments. To show the character of the evidence upon which the Iowa commission made its order, and the character of cases which the Interstate Commerce Commission now considers itself authorized to review, I wish to read the last page and a half of the Iowa commission's report in that case.

The CHAIRMAN. It may be read.

Mr. BENTON (reading):

"A pamphlet bearing the authorship of the United States Department of Agriculture, Bureau of Markets, and Missouri State Board of Agriculture, State marketing bureau, entitled 'Prevent losses of hogs in transit,' and undated, contains, among other things, this statement:

"'Hogs weighing less than 250 pounds average can not be safely loaded to required minimum weights. Better load from 15,500 to 16,000 pounds where 36-foot cars are furnished for stock averaging less than this in weight.'

"As the pamphlet contains statistics including 1917, it has been issued since that year.

Stock raisers and shippers testified that they could not safely load the minimum weight of 17,000 pounds in a 36-foot car; that the danger of injury and death to hogs in transit was too great to take the chance. That hogs should be loaded according to the size of the animals, by number, rather than attempt to crowd the minimum weight into the car. That with extra heavy hogs a sufficient number might be loaded to meet the minimum of 17,000 pounds during cool months of the year—in the spring and fall. But light hogs could not be safely loaded to exceed 15,000 to 16,000 pounds; and light hogs are now more in favor for marketing and more in demand than the excessively heavy stock. It is in evidence that rather than suffer loss by death and injury to stock, shippers have paid the minimum of 17,000 pounds on much lighter loads. This testimony is amply borne out by the exhibits filed by the carriers and shippers alike. These show that a much larger percentage of all cars of hogs shipped to all markets were loaded less than the 17,000-pound minimum and a very large percentage less than 16,000 pounds per car. Experienced hog shippers testified that there were more crippled and dead hogs in cars when loaded to full minimum weight.

We think the evidence before us clearly demonstrates that the proposed minimum of 17,000 pounds, to apply on shipments of hogs in cars 36 feet or more in length, is

unreasonable. Minimum weights should be so adjusted that the commodity concerned may reasonably be loaded in the car to the minimum weight provided. It is shown that it is exceptional, rather than the rule, that hogs are loaded to 17,000 pounds or more. We believe the 16-000-pound minimum heretofore fixed by this board is reasonable, and should continue, and the application of the carriers herein for a 17,000 minimum weight on hogs, in carloads, in Iowa, on intrastate traffic, is hereby denied.

CHAS. WEBSTER, *Chairman.*
DWIGHT N. LEWIS, *Commissioner.*
FRED P. WOODRUFF, *Commissioner.*

Mr. BENTON. Reference also has been made before the committee, at some length, by the chairman of the Oklahoma commission to the Oklahoma case.

In order that the committee may see the character of rates which the State commissions are now obliged to permit to be enforced in their States, contrary to their judgment, in order that they may not have their entire rate-making jurisdiction and power taken from them, I ask to have incorporated in the record the findings of fact and order made by the Oklahoma commission when it revoked its prior rate order, for the purpose of escaping from an order of the Interstate Commerce Commission freezing all of the Oklahoma rates in the manner that has been described to you before. I offer the findings of fact and the order.

The CHAIRMAN. I am assuming, Mr. Benton, that you are reducing your extracts to the minimum, because, as you know, this is the age of economy, and there is a good deal of criticism on the amount of printing the Senate is doing.

Mr. BENTON. I have attempted to do that, Senator.

The CHAIRMAN. They may be inserted.

(The findings of fact and the order referred to are as follows:)

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA.

CAUSE No. 4271.

In re revocation of order 1883, affecting railroad rates, fates, and charges.

Order No. 1944

FINDINGS OF FACT AND ORDER.

BY THE COMMISSION:

On the 17th day of October, 1921, there came on for hearing a reconsideration of this commission's order 1883, and now on this 20th day of October, 1921, this commission having had the foregoing matter under consideration, finds:

That heretofore, to wit, on or about the 29th day of July, 1920, there was filed by the Interstate Commerce Commission a report (58 I. C. C. 220), authorizing certain increases in transportation charges as follows: Passenger, 20 per cent; excess baggage, 20 per cent; sleeping and parlor cars, a surcharge of 50 per cent of the charge for space; milk and cream, usually carried in passenger trains, 20 per cent; freight, for the western group, including Oklahoma, 35 per cent; and switching and special service within the foregoing group, 35 per cent.

That thereafter application was made by the carriers to the commissions of the several States for increases in transportation charges corresponding to those prescribed by the Interstate Commerce Commission in its report heretofore referred to, commonly known as Ex parte 74, and that generally such applications were granted in whole or in part.

That it was generally understood when the report in Ex parte 74 was filed that the increased rates and charges would produce inequalities, injustices, and discrimination, and it was conceded by the carriers that adjustments would be necessary, and in keeping therewith it was provided in said report (58 I. C. C. 220, 256), that necessary readjustments should be made by the carriers without appealing to the Interstate Commerce Commission.

That relying on said provision of said Interstate Commerce Commission report and the further specific representation of the carriers to this commission that necessary readjustments would be made by the carriers, this commission on September 4, 1920, granted the application of the carriers, and, by its order 1781, authorized the carriers to establish, in substance, the rates authorized by the Interstate Commerce Commission in Ex parte 74, and permitted them to maintain said rates for a period of six months, and thereafter this commission on the 9th day of March, 1921, by its order No. 1867, continued in effect, with certain modifications, the rates authorized by order 1781, to June 1, 1921.

That this commission, subsequent to the issuance of said order 1781, issued its order 1807, affecting rates on crushed rock and shale between points 5.5 miles distant in

Pontotoc County, Okla.; 1813, removing discrimination on charges for transportation of coal between Dewey, Okla., and certain other coal shipping points in Oklahoma, and prescribing rates between these points similar to the rates in effect in interstate commerce between Dewey, Okla., and points in Kansas equidistant to those points in Oklahoma shipping coal to Dewey; and, 1855, prescribing rates on crushed rock between certain points within Tulsa County, Okla., which said orders have been appealed by the carriers to the Supreme Court of the State of Oklahoma and affirmed by that court.

That subsequent to the issuance of said order 1781, this commission also issued order 1872 establishing rates on paving brick when consigned to Federal, State, county, township, or municipal agencies for construction of highways.

That on or about the 12th day of May, 1921, there was filed with the Interstate Commerce Commission a petition of the carriers attacking said orders Nos. 1867 and 1872, to wit, the order of March 9, 1921, continuing in effect with certain modifications the increases authorized by Ex parte 74, and the order prescribing rates on paving brick when consigned to the agencies heretofore mentioned.

That on May 13, 1921, the carriers filed with this commission their application for authority to continue in effect the rates, fares, and charges heretofore authorized by this commission under its orders 1781, 1867, and 1872; and on May 26, 1921, there came on for hearing said application, and this commission, after hearing, determined that said increases in rates theretofore authorized were discriminatory against the State of Oklahoma and its shippers, and further found that the State of Oklahoma was paying more than its proportionate share of the charges for railroad rates, and issued its Order No. 1883 withdrawing authority theretofore granted to the carriers to maintain the increases authorized by said Ex parte 74.

That on or about June 14, 1921, the carriers filed with the Interstate Commerce Commission an amended petition further attacking said order No. 1883 of this commission.

That on August 4, 1921, an extended hearing was had before the Hon. E. I. Lewis, a member of the Interstate Commerce Commission, and the proceedings had under said hearing are now before the Interstate Commerce Commission.

That paragraph 3 of section 13 of the interstate commerce act, as amended February 28, 1920, provides for a full and thorough cooperation between the Interstate Commerce Commission and the State commissions in matters affecting intrastate rates attacked by the carriers.

That on July 6, 1921, a date after the said hearing on Oklahoma rates, fares, and charges had been ordered, the Interstate Commerce Commission filed its report and issued its order in docket No. 11916 (62 I. C. C., 440), in the matter of intrastate rates, fares, and charges in the State of Kansas, denying the authority of the State of Kansas to prescribe rates, fares, or charges different from those prescribed by the Interstate Commerce Commission for interstate transportation, and that the proceedings in the Kansas case and the issues involved therein were not materially different from the principle and the issues involved in the Oklahoma proceedings before the Interstate Commerce Commission.

That in other States where the Interstate Commerce Commission has prescribed intrastate rates, and particularly in Illinois, Indiana, and Kansas, the carriers have procured injunctions in the Federal courts prohibiting, in effect, the commissions of those States from exercising any jurisdiction, even over purely intrastate rates.

That the granting of the 35 per cent increase on freight rates authorized by the Interstate Commerce Commission for the western group would create a discrimination against intrastate shippers in Oklahoma as to many commodities; and from testimony in Interstate Commerce Commission Docket 12753, introduced as an exhibit in this proceeding, that the denial of said increases would create discrimination against interstate shippers as to certain commodities.

That it is apparent from the record heretofore made in Interstate Commerce Commission Docket 12753 and the orders heretofore entered by the Interstate Commerce Commission in other State cases that the Interstate Commerce Commission is likely, if the proceedings in the Oklahoma case now before it go to final determination, to make an order thereon similar to that made in the Kansas case, and that if such order were made and followed by an injunction obtained by the carriers in the Federal court as has resulted in other States, both this commission and the Interstate Commerce Commission would apparently be powerless to make any further adjustment of purely intrastate rates, fares, and charges.

That the intolerable condition heretofore recited in other States may be avoided by a revocation of its order 1883.

That if its jurisdiction over intrastate rates can be preserved, this commission can thereafter be of service to the State in adjusting intrastate rates and services; and

The commission further finds that said orders No. 1867 and No. 1872, heretofore attacked by the carriers in their petition before the Interstate Commerce Commission, have been revoked and annulled by this commission's order No. 1883, and that said orders Nos. 1807, 1813, and 1855, heretofore appealed by the carriers to the Supreme Court of Oklahoma and there affirmed, are not of material significance in affecting the rate structure in Oklahoma, and are not in issue in this proceeding.

ORDER.

Wherefore, premises considered, it is therefore ordered that said order 1883, heretofore issued by this commission on the 7th day of June, 1921, is hereby canceled and declared null and void.

It is further ordered, that the carriers are authorized to reinstate and reestablish rates heretofore authorized by this commission under its order No. 1781, issued on the 4th day of September, 1920, which said order authorized the carriers to establish rates similar to those authorized by the Interstate Commerce Commission in Ex parte 74 except as heretofore provided; and further provided that modifications made by the carriers themselves since the issuance of said order 1781, and rates published in their tariffs and not attacked by them in their petitions to the Interstate Commerce Commission, shall not be voided by this order; and

Provided further, that the carriers may reduce any and all rates when necessary to relieve discrimination against intrastate commerce; and

Provided further, that this order shall be subject to and shall have the benefit of any decrease in rates, fares, or charges hereafter made by the Interstate Commerce Commission or voluntarily put in effect by the carriers; and

Provided further, that nothing herein shall be construed as depriving this commission of its jurisdiction over intrastate rates, fares, or charges, or from hereafter making adjustments in such rates, fares, or charges.

It is further ordered, that the effective date of passenger, excess baggage, milk and cream when carried in passenger trains, and Pullman rates and charges herein authorized shall be November 1, 1921, and the effective date of freight and other charges herein authorized shall be November 20, 1921.

In witness whereof we have hereunto set our hands and caused to be affixed the seal of the commission, this the 20th day of October, 1921.

CAMPBELL RUSSELL, *Chairman.*
ART. L. WALKER, *Commissioner.*

Attest:
[SEAL.]

P. E. GLENN,
Acting Secretary.

STATEMENT BY COMMISSIONER HUGHES.

On June 10, 1921, this commission, by its order No. 1883, refused to continue in effect the increase in freight, passenger, and Pullman rates authorized by the Interstate Commerce Commission in Ex parte 74, and which it had theretofore placed in effect applicable to lines of railway operating within the State.

The order of the commission now is an attempt to undo what was done by the commission in the promulgation of order No. 1883. The effect of the refusal of the commission to longer continue in effect the increased railway rates in the State of Oklahoma by order No. 1883, coming as it did at a time when the consuming public of the country was in a position to most highly appreciate it, no doubt resulted in as much relief in a general way as has any order issued by this commission during the past four or five years.

The testimony taken at the hearing and upon which the order of June 10 was predicated showed conclusively that both passenger and freight rates within the State of Oklahoma were out of proportion to the rates in effect in the surrounding States and the interstate rates from surrounding States into the State of Oklahoma. No contention can be made that the facts in evidence at that hearing did not justify a reduction of railway rates, even as compared with the interstate rates in effect under the orders of the Interstate Commerce Commission, and as compared with the rates generally in effect in the neighboring States. Now it is urged that expediency requires that the full increase allowed by the Interstate Commerce Commission in Ex parte 74 be placed back into effect and that each commodity shall be by the commission considered as a separate matter for the purpose of adjusting the proper rate for intrastate traffic.

With this position I have been unable to concur. It was my conviction at the time of the commission's refusal to further continue in effect the increase as allowed

by the Interstate Commerce Commission, that the circumstances, facts, and conditions existing at that time within the State of Oklahoma, and which still exist now, if any different, in a more intense and accelerated form, required and justified the course which the commission at that time adopted. Millions of dollars have been saved to the public of the State by reason of that order. The press almost daily reflects the necessity both from the standpoint of the general public and from the standpoint of the railway companies themselves for a readjustment of transportation charges and conditions.

I do not believe that this is the time to impose additional burdens upon an already greatly overburdened citizenship. The cry of expediency, in my opinion, will not answer the question as to why railway rates are increased by a flat raise of 35 per cent in freight rates, 20 per cent in passenger rates, and 50 per cent Pullman surcharge, at a time such as we are now experiencing. The railway lines operating within the State of Oklahoma do not propose to subject themselves, either in a general way or in a specific manner, through the establishment of commodity rates, to the jurisdiction of this commission. At any time which the commission shall see fit to attempt to reduce commodity rates it will be confronted with the same organized opposition and the same intense fight against its jurisdiction as it has been during the past 16 months.

At the time of issuance of the original order putting into effect the increased freight rates in the State of Oklahoma, it was asserted by the representatives of the railway lines that commodity rates would be adjusted and that without serious opposition upon the part of the lines in case the order prayed for at that time was granted. What really happened, however, was that in the first attempt by the commission to reduce a commodity rate, a stubborn fight was made by the railway lines affected, both at the hearing before the commission and in the hearing on appeal before the Supreme Court. Numerous other instances of attempts of the commission to return to a prewar rate basis was met with the same opposition upon the part of the transportation lines. This will be as true as to any attempt to reduce commodity rates in the future as it has been in the past.

Therefore, I have reached the conclusion that if railway rates are to be again increased, it must be at the hands of others. In thus disagreeing with my brethren of the commission I intend no disrespect, but am simply pronouncing my opinion upon a fundamental question of policy.

E. R. HUGHES,
Commissioner.

Mr. BENTON. I was at the point also of offering the dissenting reports of interstate commissioners in the Kansas case, concerning which Judge Reed made a statement yesterday. They cover only four or five pages. I do not offer the majority reports, because they are long. They are here to be inserted in the record if the chairman sees fit to insert them. I offer and ask to read the minority reports, for the purpose of confirming by them the statements concerning the Kansas rates which Judge Reed made.

The CHAIRMAN. They may be read.

Mr. BENTON (reading):

"Eastman, commissioner, dissents.

"Campbell, commissioner, dissenting: I am unable to give my assent to the conclusions reached by the majority herein. I can not believe that the Congress, by enacting the amendment of 1920 to the interstate commerce act, intended to do more than to express by statute the law as announced in the Shreveport cases. The dissenting opinion of Commissioner Eastman in Rates, Fares, and Charges of New York Central Railroad Co. (59 I. C. C., 290, 299) to my mind is a clear exposition of the law and construes the act, in so far as this particular feature is concerned, as the Congress intended it to be construed.

"The report in this case clearly shows that the court of industrial relations of Kansas had under consideration the earnings accruing to the various carriers under the existing State rates when it denied the increases sought by the carriers following our decision in Increased Rates, 1920 (58 I. C. C., 220). It calls particular attention to the fact that the intrastate class rates between many points in Kansas are relatively higher than certain interstate rates. Notwithstanding this showing of the existence of apparent discrimination between State and interstate rates, the majority in effect perpetuates this discrimination instead of ordering its removal and thereby takes away from the State authorities the right to remove discrimination which may have existed and which will hereafter continue to exist.

"I have not been able after a careful reading of section 13 to find any new grant of jurisdiction over intrastate rates that the commission did not already have under section 3 through the doctrine announced in the Shreveport decisions. Subdivision 4

of section 13 provides that whenever after investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulations, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination Clearly pointing out that we, in order to take jurisdiction over intrastate rates, must after full hearing find discrimination. The proceedings in all of the State cases clearly indicate to my mind that they are not instituted and the hearings held for the purpose of determining discrimination only, but for the purpose of determining the amount of revenue to be given to the carriers. I can not bring myself to believe that the law is broad enough to vest us with jurisdiction over intrastate rates for revenue purposes, especially when we take into consideration subdivision 2 of section 1 of the interstate commerce act, which states that the provisions thereof shall not apply.

"(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid.

"Lewis, commissioner, dissenting in part: While holding the belief that the railoa ds of this country must be viewed and dealt with broadly as a national transportaio n system, and that if State authority seeks to maintain preferences for local interests that are detrimental to realization of such concept a broader regulation must be applied, I believe that the majority in this instance carry the doctrine of Federal authority to unjustified extremes.

"My conception of the intent of the Congress, as expressed in section 15(a) of the interstate commerce act, is that—at least in meeting the extreme crisis that confronted the Congress at the time of its enactment and which still continues—no State shall have the power to maintain charges for transportation which will result in that State's failing to carry its just part of the transportation load or create conditions which will thwart this accomplishment.

"As I view it, Federal authority is, therefore, applicable only (1) to prevent unjust discrimination or undue preference, prohibited by sections 2, 3, and 13 of the interstate commerce act, or (2) in the matter of rates, fares, and charges which do not sustain their fair share of the burden of maintaining the national system of transportation (sec. 15(a)). I therefore concur in the application of Federal authority to set aside State-authorized tariffs, such, for example, as those for the transportation of passengers in Kansas.

"Again, using passenger fares for purposes of illustration, wholly aside from the discrimination between intrastate and interstate passengers in Kansas, there is discrimination between people in Kansas paying a 3-cents-per-mile rate and people in Nebraska, Colorado, Missouri, Iowa, and other States in the same group, who, either by action of their own State commissioners or by reason of action by this commission, are paying 3.6 cents per mile for the same service performed under conditions that are practically identical with those prevailing in Kansas. Moreover, the maintenance of lower rates for like service in one State causes resentment in the other States. Ultimately this must be reflected in unfavorable action in States that otherwise would willingly carry their full apportionment of the burden of transportation. Such conditions would lead to destructive confusion, if not to chaos. It is obvious that losses resulting from such lower rates and fares or disturbances must be recouped by (1) higher interstate rates and fares or (2) higher rates and fares in other States. I concur, therefore, in the action of the majority in the matter of all such rates, fares, and charges which not only are violative of the prohibition against unjust discrimination and undue preference or prejudice, but which also fail to meet the requirements of section 15(a).

"However, there is in Kansas a great body of freight rates prescribed by State authority that are higher than corresponding interstate rates. The report sets out the fact that the mileage class rates applicable generally throughout the State exceed the rates on traffic moving into Kansas from those points where the principal competition is encountered. Further, due to the absence of joint rates, the intrastate shipper must pay for the transportation of his traffic, as a rule, a greater sum than is required of his competitors at Kansas City and St. Joseph. The report shows that the rates on live stock and certain other commodities which can be isolated and dealt with separately does not appear to have been exercised in a manner unfair to the

railroads or—except in such instances—has not failed to cover its part of the maintenance, operation, and success of the national or group transportation system.

"The State's action was taken after hearing. The foregoing report and order shows that 'the steam carriers and court of industrial relations estimate that on a year's business the revenues of the steam carriers from intrastate traffic in Kansas would be considerably over $3,000,000 less than if the increases authorized by us for interstate commerce were applied.' The carriers' estimate is $3,245,942.45, and the estimate of the court of industrial relations is $3,409,636.49. These estimates segregate the specific business on which the so-called losses occur. They show that by putting into effect the interstate passenger, excess-baggage, and milk and cream rates approximately $1,950,000 of this loss could be prevented and that practically all of the remainder would be wiped out by similar action in the case of rates on a few specific commodities.

"The most unfortunate effect of such sweeping condemnation of all State rates is the prostration of State authority. The effect is to create a situation in which local facilities for readjusting State rates to the level of interstate rates are seriously disturbed, if not destroyed. On the other hand, the Federal commission does not set itself to the work of making corrections. It contents itself by declaring that its order is not to be in Kansas, being based on the mileage scale, are relatively higher than the interstate rates. Other such instances in which the disadvantage is against the intrastate shipper are cited.

"The transportation services whether pertaining to interstate or intrastate commerce are found to be performed under substantially similar circumstances and conditions. How, then, in such instances where the interstate shipper now pays a relatively lower rate than the intrastate shipper, can it be found that he is subjected to undue prejudice, or that free movement of interstate commerce is impeded or that such rates result in a burden being laid on interstate commerce?

"I am not unmindful of the provision that nothing in the order shall be construed as requiring any common carrier to establish, put in effect, or maintain any rate, fare, or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare, or charge applicable to such transportation in interstate commerce. This, however, does not fully meet the situation in at least several respects, which need not be discussed here.

"It is my opinion that the commission goes too far when, encountering such a situation, it seeepingly condemns practically the entire State rate structure and issues an order, the effect of which is to set aside or cripple State authority that, except in the case of certain rates construed as requiring the carriers to maintain intrastate rates in excess of corresponding interstate rates, leaving to whoever may be interested the task of determining the comparative levels and instituting such action as may be necessary to remove discrimination against State traffic.

"Objections such as outlined could be eliminated by recognition of State authority, with approval, to the extent that it has functioned properly, and by limiting invasion by Federal authority only in so far as is necessary to correct such State authority exercised at variance with the requirements of the Federal law.

"In short, my concept of the law and of possibilities for its successful and more acceptable administration inclines me to a course of preservation and strengthening of State tribunals which are well designed for the hearing and settlement of local affairs and to the working out of a coordination of such agencies with those of Federal regulations."

Mr. BENTON. Now, that completes what I want to say at this point about these State rate cases.

On account of headlines which I have seen in the newspapers within a day or two and for the purpose of guarding against any possible misapprehension of the spirit and purpose which have animated the men who have appeared here to give you this information, I want to say that there is involved no disposition to criticize the personnel or the purpose of the Interstate Commerce Commission. We recognize the fact that it has upon it men of integrity and ability who are atetmpting to serve, and in the main are serving, their country well. We are criticizing the character of orders which they have made, and the character of the jurisdiction which they attempt to assert over State rates. We think they have misconstrued the law. We think they have erred in their policies. I have called attention to the fact that Commissioner Eastman dissented in a most logical and able opinion in the New York case, and I put that dissenting report in. I ought to have stated that the records of the Interstate Commerce Commission show that Commissioner Potter, who, I think, will be generally conceded to be one of the best qualified men called to that commission, an able lawyer, dissented. I have not personally seen the records, but Commissioner Potter told me that the records do so disclose, shortly after the New York case was

decided. And I violate no confidence—because the commissioner talks about it with everybody with perfect freedom—when I say that he not only dissented, but that he strongly opposed the order therein made, and the policy therein adopted, not only on the grounds of law, but upon the grounds of policy; because he recognized that it represented a departure from our established policy of government.

And I feel free to say, because he always says, that he believes that there must be a coordination of the State and Federal commissions in order that there may be effective and satisfactory regulation in this great country. He dissented in that case. Whether other commissioners dissented or not, I do not know. His dissent was not published. I have no reason to think that other commissioners dissented. No other commissioners' names were published and no other commissioner has indicated to me that he dissented. But since then, as shown by the dissents printed in the Kansas case, two newly appointed commissioners—Campbell and Lewis—have dissented; the first upon the grounds of law, and whether he said so in his report or not, I think also on the grounds of policy; and Commissioner Lewis on the grounds of policy. So that there is not any lonesome dissent within the commission itself with regard to the wisdom and legality of the orders that they have been making. That is all I desire to say with respect to the first resolution.

There have been a considerable number of resolutions passed by State legislatures. I sent out, some time ago, a circular letter to State commissions, asking them to supply me with such resolutions, so that I might present them here. Such resolutions have been sent in to me to the number of 20 or 25. I forget the exact number. I think it is probably approximately complete. I know it is not entirely complete. For example, in the State of Ohio, I was advised last winter by the counsel for the Ohio commission that a resolution along the same line passed the Ohio Assembly. But I haven't it. Those that I have I present and ask to have incorporated here as a part of my statement.

The CHAIRMAN. They may go in.

(The resolutions referred to are as follows:)

HOUSE CONCURRENT RESOLUTION 5, PASSED BY BOTH HOUSES OF ARIZONA LEGISLATURE.

Whereas the recent decision of the Interstate Commerce Commission in the Illinois rate case interprets the Esch-Cummins Act as giving them complete authority over the railways, the entire field of transportation, the traffic itself and all the instrumentalities and means of carrying it on; and

Whereas it means that the laws of the States are ignored and that the Interstate Commerce Commission has assumed exclusive authority over the railways; and

Whereas the mining and agricultural industries of Arizona will be seriously handicapped, if not entirely destroyed, by any further increase in existing rates; and

Whereas the freight and passenger rates are already burdensome to the producers and consumers, and the railroads have asked for further increase in rates, with no consideration apparently having been given in the recent raise in rates as to the high cost of production and operation in Arizona, with no completed valuation of the railway or as to the fact that the railways in this State have not millions invested in depots and terminals, we consider it unwise to confer upon the Interstate Commerce Commission the greatest power ever given to a body of men in peace times: therefore, be it

Resolved by the House of Representatives (the Senate concurring), That we call upon Congress to so amend the transportation act and in such plain language that the authority of the States over intrastate traffic in their respective territories will be maintained without an opportunity for misinterpretation; and be it further

Resolved, That a copy of this resolution be sent to each United States Senator and Congressman from Arizona.

Adopted by the House March 3, 1921.

Adopted by the Senate March 5, 1921.

Approved March 8, 1921.

ASSEMBLY JOINT RESOLUTION 31, RELATIVE TO REVISION OF THE FEDERAL TRANSPORTATION ACT OF 1920 TO ESTABLISH A JUST AND EQUITABLE RULE OF RATE MAKING.—PASSED BY CALIFORNIA LEGISLATURE, 1921.

Whereas by section 422 of the transportation act, 1920, amending the interstate commerce act by adding section 15 (a) thereto, the Congress of the United States prescribed a rule of rate making whereby the Interstate Commerce Commission shall

fix rates so that carriers as a whole will under honest, efficient, and economic management and reasonable expenditures for maintenance of ways, structures, and equipment earn an aggregate annual net railway operating income of 6 per cent upon the aggregate value of railway property held for and used in the service of transportation; and

Whereas said transportation act as now framed applies to and assures a 6 per cent income return to all railway properties, regardless of whether or not said property was reasonably acquired for, or properly applied to, transportation uses; and

Whereas such rule of rate making in effect guarantees to carriers annual net earnings and removes the incentive for efficiencies in operation and economy in expenditures; and

Whereas such rule of rate making imposes upon shippers and the public an excessive transportation burden, making it impossible for producers to market their products and destroying the value of producing properties, especially agricultural and horticultural lands, and has in its operation wholly failed to accomplish any beneficial results for the carriers, but on the contrary has been detrimental to the interests of producers and the public at large: Now, therefore, be it

Resolved by the assembly and senate jointly, That the Legislature of the State of California at its forty-fourth session petitions the Congress of the United State to reconsider the transportation act of 1920, and urges Congress to eliminate the objectionable features herein pointed out, and to grant a rate structure that will not place a false earning power on a large fictitious railroad capital, the payment of which is stifling to industries of the Pacific coast; and be it further

Resolved, That a copy of this joint resolution be sent to the President of the United States, to the Interstate Commerce Commission, to the members of the Committee on Commerce of the Senate, and to the members of the Committee on Interstate and Foreign Commerce of the House of Representatives, to the governors of each of the Western States, and to each Member of the Senate and House of Representatives of the United States from the State of California.

CONCURRENT RESOLUTION OF THE TWENTY-THIRD GENERAL ASSEMBLY OF THE STATE OF COLORADO.

House concurrent resolution No. 3, the senate concurring, to the Congress of the United States to so amend the transportation act, 1920, as to eliminate therefrom the rule of rate making as applied to intrastate rates, and to reserve to the States of the Union power with relation to intrastate rates, service, and facilities, and local questions affecting common carriers within the States:

Whereas the Interstate Commerce Commission through its interpretation of the transportation act, 1920, has indicated its purpose to assume for itself full and exclusive authority to regulate the railroads and all instrumentalities entering into the field of transportation, and thereby to divest the legislatures of the several States of substantially all power to regulate the intrastate rates and service of the railroads within the respective States; and

Whereas in conformity with this policy and acting upon what it claims to be the intent of Congress in the enactment of section 13(4) of the transportation act, 1920, the Interstate Commerce Commission has made orders which seek to compel increases and other changes in intrastate rates in a number of States, without regard or heed to the protests of the governments of those States; and

Whereas the authority it has assumed for itself permits the Interstate Commerce Commission to wield the greatest power ever exercised by any body in peace times, which if allowed to take its logical course must inevitably develop into a bureaucratic system repugnant to the American theory of government; and

Whereas it is unjust and unnecessary to permit the development of a system which will compel a citizen of Colorado or any other State either to forego relief for local transportation problems or seek it solely through the Interstate Commerce Commission at Washington at great expense in time and money; and

Whereas before the passage by Congress of the transportation act, 1920, there was no serious conflict between Federal authority in the regulation of interstate commerce and State authority in the regulation of intrastate commerce; and

Whereas all government, whether through Federal or State agency, is directed to the sole end of promoting the welfare and happiness of the people, it is our firm conviction that it is neither sound nor practical government to deny to the people of the several States the undeniable benefits of State regulation of commerce within the States upon the assumption that to do otherwise may in some way be prejudicial to commerce between the people in the different States: Therefore be it

Resolved by the senate (the house concurring), That the General Assembly of the State of Colorado hereby respectfully petitions the Congress of the United States to so amend the transportation act, 1920, as to protect and preserve the powers of the several States with relation to intrastate rates, services, and facilities and the local affairs of the common carriers within the States, and to make such amendment or amendments in language so plain that the authority of the States in their respective territories shall be maintained without opportunity for misinterpretation; and be it further

Resolved, That the secretary of state of Colorado be, and hereby is, directed to transmit a certified copy of this resolution to each United States Senator and each Representative in Congress from Colorado.

Introduced and passed February 26, 1921.

RESOLUTION ADOPTED BY BOTH HOUSES OF THE GEORGIA LEGISLATURE.

Whereas in recent decisions of the Interstate Commerce Commission interpretations have been given the transportation act of 1920, such as gives to the Interstate Commerce Commission complete authority over the entire subject of transportation and including the right to prescribe intrastate rates; and

Whereas it means, in effect, the abrogation of all authority of State regulation to make and prescribe rates for intrastate movement of freight; and

Whereas the freight rates are in some instances so burdensome and excessive at this time as to prohibit the movement of various commodities, and the passenger rates are so excessive as to deter travel to the end that the railroads are receiving less in passenger revenues than they would receive if a lesser rate were in effect: Therefore be it

Resolved by the House of Representatives of the State of Georgia (the Senate of Georgia concurring), That we call upon the Congress of the United States to so amend the transportation act of 1920, and in such plain language, that the authority of the States over intrastate traffic in their respective States will be fixed and certain in language plainly declaring the right of States to prescribe intrastate rates; be it further

Resolved, That a copy of this resolution be sent to each United States Senator and Congressman from the State of Georgia.

HOUSE RESOLUTION NO. 12, PASSED BY THE KANSAS HOUSE OF REPRESENTATIVES, 1921.

Whereas the Interstate Commerce Commission of the United States has construed the Esch-Cummins Act as conferring upon said commission full and complete authority over railways, the entire field of transportation, the traffic itself, and all instrumentalities and means of carrying it on, and by setting at naught the laws of several States in regard thereto: Now, therefore, be it

Resolved by the House of Representatives of the State of Kansas, That we urge our Senators and Members in Congress to use their influence and best endeavor to have said transportation act so amended that it will in plain and concise language confer upon the several States full authority and jurisdiction over all railways within their respective territories.

RESOLUTION ADOPTED BY LOUISIANA CONSTITUTIONAL CONVENTION, MAY 9, 1921.

Whereas the Interstate Commerce Commission, through its interpretation of the transportation act, 1920, has indicated its purpose to assume for itself full and exclusive authority to regulate the railroads and all instrumentalities entering into the field of transportation, and thereby to divest the legislators of the several States of substantially all power to regulate the intrastate rates and service of the railroads within the respective States; and

Whereas in conformity with this policy and acting upon what it claims to be the intent of Congress in the enactment of section 13 (4) of the transportation act, 1920, the Interstate Commerce Commission has made orders which seek to compel increases and other changes in intrastate rates in a number of States, without regard or heed to the protests of the government of those States; and

Whereas the authority it has assumed for itself permits the Interstate Commerce Commission to wield the greatest power ever exercised by any body in peace times, which, if allowed to take its logical course, must inevitably develop into a bureaucratic system repugnant to the American theory of government; and

Whereas it is unjust and unnecessary to permit the development of a system which will compel a citizen of Louisiana or any other State either to forego relief for local transportation problems or seek it solely through the Interstate Commerce Commission at Washington at great expense in time and money; and

Whereas before the passage by Congress of the transportation act, 1920, there was no serious conflict between Federal authority in the regulation of interstate commerce and State authority in the regulation of intrastate commerce; and

Whereas all government, whether through Federal or State agency, is directed to the sole end of promoting the welfare and happiness of the people, it is our firm conviction that it is neither sound or practical government to deny to the people of the several States the undisputable benefits of State regulation of commerce within the States upon the assumption that to do otherwise may in some way be prejudicial to commerce between the people of the different States: Therefore be it

Resolved by this constitutional convention, That the Congress of the United States is hereby respectfully petitioned to so amend the transportation act, 1920, as to protect and preserve the powers of the several States with relation to intrastate rates, services, and facilities, and the local affairs of the common carriers within the States, and to make such amendment or amendments in language so plain that the authority of the States in their respective territories shall be maintained without opportunity for misinterpretation; and be it further

Resolved, That the secretary of this convention be, and hereby is, directed to transmit a certified copy of this resolution to each United States Senator and each Representative in Congress from Louisiana.

CONCURRENT RESOLUTIONS ADOPTED BY MICHIGAN LEGISLATURE, 1921.

A resolution requesting Congress to repeal the Esch-Cummins Act.

Whereas the so-called Esch-Cummins Act, enacted by Congress at the last regular session, places an unjust burden of taxation and transportation charges upon the people of the State of Michigan:

Resolved by the house of representatives (the senate concurring), That we earnestly and urgently petition the Congress of the United States to repeal the Esch-Cummins Act.

Resolved, That copies of this resolution be mailed by the clerk of the house of representatives and the secretary of the senate to the United States Senators for Michigan and to the Michigan Members of the National House of Representatives.

A resolution memorializing Congress to restore to the States control of intrastate railroads.

Whereas the Congress of the United States has by the interstate commerce act, as amended by the transportation act of 1920, attempted to control the capital securities of railroad corporations organized under State sovereignty whose lines are built wholly within the State, thereby depriving the State of its control thereof, and indirectly placing under the control of the Interstate Commerce Commission all matters of improvements, extensions, betterments, abandonments, and discontinuance of railroad lines and facilities, and has attempted to deprive the State of its control over capital securities of corporations created under its laws; of its control over extensions, betterments, abandonments, and discontinuances of railroad lines wholly within the State; of its control of train service wholly within the State; of its power over police regulations, grade separations, safety appliances, and sanitary terminals; and has established rates for intrastate commerce, and the Interstate Commerce Commission has assumed to set aside State freight and passenger rates for intrastate traffic, and has sought to deprive shippers and travelers of the right to complain of the confiscation of their property by the extortion pursuant to the orders of the Interstate Commerce Commission, of rates and fares "substantially and unreasonably in excess of a fair return upon the value of the railway property held for and used in the service of transportation," and such action upon the part of the Congress of the United States as construed by the Interstate Commerce Commission has crippled manufacturing industries, destroyed the value of farms and of farm products, placed an unreasonable burden upon the public, enabled the railroads to pay extortionate and unreasonable costs of operation, crippled transportation, and impaired the general welfare of the people: Now, therefore, be it

Resolved by the house of representatives (the senate concurring), That the Legislature of the State of Michigan urge upon all members of the Congress of the United States, and particularly the Members thereof representing the State of Michigan, the amendment of the interstate commerce act as amended by the transportation act of 1920 so as to restore to the States the control of the capital securities of all railroad corporations created under the sovereignty of the States and operating railroads wholly within the territorial limits thereof, the control by the States of intrastate rates over intrastate traffic, and the authority of the States to compel service by railroads in the transportation of persons and property on the basis of a fair return upon the fair value of the used and useful property of the railroad company.

CONCURRENT RESOLUTION PASSED BY BOTH HOUSES OF MINNESOTA LEGISLATURE.

CONCURRENT RESOLUTION Memorializing Congress of the United States to nullify certain orders of the Interstate Commerce Commission affecting intrastate railroad rates and to amend the act to regulate commerce so as to render such orders in the future impossible.

Whereas in the so-called Esch-Pomerene bill to amend the act to regulate commerce it was provided that the Interstate Commerce Commission should have authority to make such orders as might in its judgment tend to remove any undue burden upon interstate or foreign commerce;

Whereas there was widespread apprehension both in Congress and with the public generally that the inclusion of such a provision would almost, if not entirely, eliminate State control of intrastate railroad rates, for the reason that the commission might decide that any intrastate rates upon a lower basis than corresponding interstate rates would constitute such undue burden;

Whereas after much debate upon the question, both in committee and upon the floor of the House of Representatives, it was decided that such objectionable provision should be and the same was stricken out of the bill;

Whereas the Interstate Commerce Commission has, since the passage of the transportation act, 1920, interpreted section 13(4) of the act to regulate commerce, to confer upon it the same power over intrastate rates which it was feared would result had said undue burden clause been included; and, purporting to act under the authority of said section, the commission has already made orders purporting to change entire systems of intrastate rates in the States of New York, Illinois, Minnesota, and Wisconsin, and has many similar proceedings now pending before it;

Whereas the reason given by the commission for the orders in question would apply wherever intrastate rates are upon a lower basis than the corresponding interstate rates, so that, under its interpretation of said section 13(4), the legislatures of the several States have been deprived of substantially all power to regulate intrastate rates;

Whereas the construction placed upon said section is not only in contravention of the tenth amendment to the Constitution of the United States, but is directly contrary to the will of Congress as evidenced by its action when it removed said undue burden clause from the Esch-Pomerene bill: Wherefore, it is

Resolved by the House of Representatives of the State of Minnesota, the Senate concurring, That the Congress of the United States be, and it is hereby, respectfully and earnestly petitioned to take such action as will nullify the orders of the Interstate Commerce Commission hereinabove mentioned and to so amend the act to regulate commerce as to render such orders impossible in the future.

Approved, April 8, 1921.

RESOLUTION ADOPTED BY THE NEBRASKA SENATE FEBRUARY 17, 1921, AND BY THE HOUSE THE SAME DATE.

Whereas the Interstate Commerce Commission last summer increased freight rates 35 per cent and passenger rates 20 per cent in a large territory west of the Mississippi River, and of which Nebraska is a part, in order to supply additional revenue to railroad carriers in the sum of more than $500,000,000 a year in said territory; and

Whereas in the consideration of increases on purely State traffic, passenger and freight, the Nebraska State railway commission, acting with full knowledge of the transportation needs within the State, denied that it was any part of the duty of shippers of Nebraska to pay excess rates in order to bolster up weak railroads in less prosperous States than Nebraska, and refused to approve the full increases provided by the Interstate Commerce Commission on interstate business; and

Whereas the Interstate Commerce Commission, on the assumption that it has the right to invade the powers of the States within their own borders, has just ordered the railroads to increase freight rates another 10 per cent and passenger rates 20 per cent, in defiance of the orders of the State commission and the statutes of this State, thereby seeking to add another $3,000,000 per annum to the high rates already being paid by the people: Therefore, be it

Resolved by the Senate of the Nebraska Legislature in session assembled, That we indorse the efforts now being made by the railway commission and the attorney general to defend the sovereign police power of the State against further Federal encroachment and give them full support and such financial aid as is necessary to carry through the struggle: And be it further

Resolved, That we urge upon the Nebraska Members of Congress (that in the event the courts sustain the interpretation of law made by the Interstate Commerce Commission) to give their support to amendments to that law which will restore to the State the very proper and necessary full supervision over the rates of railroads within its borders: And be it further

Resolved, That a copy of these resolutions be respectfully transmitted to the Nebraska Members of Congress by the secretary of the senate.

ASSEMBLY JOINT RESOLUTION PASSED BY BOTH HOUSES OF NEVADA LEGISLATURE IN 1921.

JOINT RESOLUTION Memorializing the Congress of the United States to so amend the transportation act, 1920, as to eliminate therefrom the rule of rate making as applied to intrastate rates, and to reserve to the States of the Union power with relation to intrastate rates, services, and facilities, and local questions affecting common carriers within the States.

Whereas the Interstate Commerce Commission, through its interpretation of the transportation act, 1920, seems to indicate its purpose to assume for itself full and exclusive authority to regulate the railroads and all instrumentalities entering into the field of transportation, and thereby to divest the legislatures of the several States of substantially all power to regulate the intrastate rates and service of the railroads within the respective States; and

Whereas, in conformity with this policy and acting upon what it claims to be the intent of Congress in the enactment of section 13 (4) of the transportation act, 1920, the Interstate Commerce Commission has made orders which seek to compel increases and other changes in intrastate rates in a number of States, without regard or heed to the protests of the governments of those States; and

Whereas the authority it has assumed for itself permits the Interstate Commerce Commission to wield unreasonable power; and

Whereas it is unjust and unnecessary to permit the development of a system which will compel a citizen of Nevada or any other State either to forego relief for local transportation problems or seek it solely through the Interstate Commerce Commission at Washington at great expense in time and money; and

Whereas before the passage by Congress of the transportation act, 1920, there was no serious conflict between Federal authority in the regulation of interstate commerce and State authority in the regualtion of intrastate commerce; and

Whereas all government, whether through Federal or State agency, is directed to the sole end of promoting the welfare and happiness of the people, it is our firm conviction that it is neither sound nor practical government to deny to the people of the several States the indisputable benefits of State regulation of commerce within the States upon the assumption that to do otherwise may in some way be prejudicial to commerce between the people of the different States: Therefore be it

Resolved by the assembly (the senate concurring), That the Legislature of the State of Nevada hereby respectfully petitions the Congress of the United States to so amend the transportation act, 1920, as to protect and preserve the powers of the several States with relation to intrastate rates, services, and facilities and the local affairs of the common carriers within the States, in so far as the same shall not clearly and directly conflict with or discriminate against interstate rates, services, and facilities established by or under the authority of the Interstate Commerce Commission and to make such amendment or amendments in language so plain that the authority of the States in their respective territories shall be maintained without opportunity for misinterpretation; and be it further

Resolved, That the secretary of the State of Nevada be, and he is hereby, directed to transmit a certified copy of this resolution to the United States Senate and House Committees on Interstate Commerce, respectively, and to each United States Senator and Representative in Congress of the State of Nevada.

RESOLUTION PASSED BY NEW YORK PUBLIC SERVICE COMMISSION, FIRST DISTRICT, MARCH 11, 1921.

Whereas the transportation act, 1920, as construed by the Interstate Commerce Commission, authorizes that commission to regulate not only the interstate rates of public utilities but also all State rates which are in supposed conflict with interstate rates on the theory that they unjustly discriminate against them; and

Whereas by this means the Interstate Commerce Commission has sought and is now seeking to acquire control over all State rates, whether fixed by statute or franchises granted by the sovereign States; and

Whereas there now exists and will continue to exist a conflict between State and Federal authority regarding the right of the latter to regulate State rates, which has been productive of much litigation because of the rulings of the Interstate Commerce Commission: Therefore be it

Resolved, that the Public Service Commission of the State of New York, first district, respectfully petitions the Congress of the United States, and requests the Representatives of the State of New York in the Senate and Congress of the United States to have the transportation act, 1920, so amended that it will define in clear and concise language the authority of the Interstate Commerce Commission and preserve to the sovereign States the powers which they constitutionally possess of regulating the rates and practices of intrastate carriers within their borders.

CONCURRENT RESOLUTION PASSED BY BOTH HOUSES OF NORTH DAKOTA LEGISLATURE, 1921.

Whereas the Congress of the United States enacted the transportation act of 1920, which said act amended the powers of the Interstate Commerce Commission; and

Whereas the Interstate Commerce Commission pursuant to such amended powers has construed the act as giving them power to regulate, increase, and prescribe intrastate rates for transportation of persons and property entirely within the States to the same extent that it exercises its jurisdiction over interstate rates; and

Whereas the Interstate Commerce Commission is this day holding a hearing in the city of Bismarck for the avowed purpose of investigating the entire body of intrastate rates, fares, and charges applicable solely within the State of North Dakota, with a view to increasing said freight rates 35 per cent, and increasing said passenger rates 20 per cent, although the Board of Railroad Commissioners of the State of North Dakota at a full hearing found that no increase was warranted, it appearing that the carriers, based upon their own book value of property devoted to common carrier purposes in the State of North Dakota, amounting to $185,440,198, are earning over $3,000,000 more per year than 6 per cent upon such value; and

Whereas the North Dakota intrastate rates which it is their avowed purpose to increase 35 per cent, judging from the action taken in similar cases in connection with the intrastate rates of other sovereign States of the Union, are as high now and in some instances higher than the intrastate rates of Minnesota are with the increase of 35 per cent; and

Whereas the increase of 35 per cent as intended in the intrastate rates of North Dakota will make said rates 35 to 40 per cent higher than the level of intrastate rates in Minnesota: Be it

Resolved, That the Senate of North Dakota, the House concurring, memoralize the Congress of the United States, bringing to its attention this condition of assuming jurisdiction of internal affairs of the State of North Dakota, urging the Congress of the United States to amend the interstate commerce act (41 Stat. L., p.474), section 13, paragraph 4, the section under which the Interstate Commerce Commission is presuming to assert authority over internal affairs of this State, limiting said commission so that it can not authorize blanket increases in intrastate rates.

HOUSE CONCURRENT RESOLUTION 12. PASSED BY OKLAHOMA LEGISLATURE.

CONCURRENT RESOLUTION Memorializing the Congress of the United States to nullify certain orders of the Interstate Commerce Commission affecting intrastate railroad rates and to amend the act to regulate commerce so as to render such orders in the future impossible.

Whereas, in the so-called Esch-Pomerene bill to amend the act to regulate commerce, it was provided that the Interstate Commerce Commission should have authority to make such orders as might in its judgment tend to remove any undue burden upon interstate or foreign commerce;

Whereas there was widespread apprehension, both in Congress and with the public generally, that the inclusion of such a provision would almost, if not entirely, eliminate State control of intrastate railroad rates for the reason that the commission might decide that any intrastate rates upon a lower basis than corresponding interstate rates would constitute such undue burden;

Whereas after much debate upon the question, both in committee and upon the floor of the House of Representatives. it was decided that such objectionable provision would be and the same was stricken out of the bill;

Whereas the Interstate Commerce Commission has, since the passage of the transportation act, 1920, interpreted section 13 (4) of the act to regulate commerce to confer upon it the same power over intrastate rates which it was feared would result had said undue burden clause been included; and, purporting to act under the authority of said section, the commission has already made orders purporting to change entire systems of intrastate rates in the States of New York, Illinois, Minnesota, and Wisconsin, and has many similar proceedings now pending before it;

Whereas the reasons given by the commission for the orders in question would apply wherever intrastate rates are upon a lower basis than the corresponding interstate rates so that under its interpretation of said section 13 (4), the legislatures of the several States have been deprived of substantially all power to regulate intrastate rates;

Whereas the construction placed upon said section is not only in contravention of the tenth amendment to the Constitution of the United States but is directly contrary to the will of Congress as evidenced by its action when it removed said undue-burden clause from the Esch-Pomerene bill: Wherefore it is

Resolved by the House of Representtives of the State of Oklahoma, the Senate concurring, That the Congress of the United States be and is hereby respectfully and earnestly petitioned to take such action as will nullify the orders of the Interstate Commerce Commission herein above mentioned and to so amend the act to regulate commerce as to render such orders impossible in the future.

Resolved, That the secretary of the State of Oklahoma be and he is hereby directed to transmit a certified copy of this resolution to each United States Senator and each Representative in Congress of the State of Oklahoma.

Passed March 8, 1921.

CONCURRENT RESOLUTION PASSED BY SOUTH DAKOTA LEGISLATURE, 1921.

CONCURRENT RESOLUTION Memorializing Congress to amend the transportation act, 1920, so as to eliminate therefrom the rule of rate making and so as to preserve to the States control of intrastate affairs of common carriers.

Whereas by the provisions of section 15a of the transportation act, 1920, approved February 28, 1920, the Congress of the United States prescribed "that during the period beginning March 1, 1920, the commission shall take as such fair return a sum equal to 5½ per cent of such aggregate value but may, in its discretion, add thereto a sum not to exceed one-half of 1 per cent of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the commission, are chargeable to capital account," and thereby enacted a rule of rate making, so called, to be observed by the Interstate Commerce Commission in exercising its power to prescribe interstate rates; and

Whereas the result of such rule of rate making, so called, is practically to guarantee to common carriers annual net earnings from operations and to remove the incentive for care and economy and expenditures for operations; and

Whereas the policy embodied in such rule of rate making is, in the opinion of the Legislature of the State of South Dakota, detrimental to the public interests; and

Whereas by several provisions of the transportation act, 1920, approved February 28, 1920, the Congress of the United States vested broad powers in the Interstate Commerce Commission, which that commission is attempting to exercise with a view to controlling interstate commerce and the instrumentalities thereof and with a view to preventing discriminations against and burdens upon interstate commerce, in such a way as to deprive the several States of their right to regulate, under the police powers, intrastate rates, services, and facilities, and the local affairs of common carriers: Therefore be it

Resolved, By the House of Representatives of the State of South Dakota, the Senate concurring, That the Legislature of the State of South Dakota hereby petitions and memorializes the Congress of the United States so to amend the transportation act

1920, as to eliminate therefrom the rule of rate making, so called, and to so define and curtail the powers of the Interstate Commerce Commission as to protect and preserve the powers of the several State commissions with relation to intrastate rates, services, and facilities and the local affairs of common carriers within the States; and be it further

Resolved, That the secretary of state of South Dakota be and he is hereby directed to transmit a certified copy of this resolution to each United States Senator and each Representative in Congress of the State of South Dakota.

CONCURRENT RESOLUTION CONCERNING CONTROL OF INTRASTATE AFFAIRS OF COMMON CARRIERS, PASSED BY BOTH HOUSES OF SOUTH CAROLINA LEGISLATURE.

Whereas by the provisions of section 15a of the transportation act, 1920, approved February 28, 1920, the Congress of the United States prescribed "that during the period beginning March 1, 1920, the commission shall take as such fair return a sum equal to 5½ per cent of such aggregate value, but may, in its discretion, add thereto a sum not to exceed one-half of 1 per cent of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the commission, are chargeable to capital account," and thereby enact a rule of rate making, so called, to be observed by the Interstate Commerce Commission in exercising its power to prescribe just and reasonable interstate rates; and

Whereas the result of such rule of rate making, so called, is practically to guarantee to common carriers annual net earnings from operations and to remove the incentive for care and economy and expenditures for operations; and

Whereas, the policy embodied in such rule of rate making is, in the opinion of the Legislature of the State of South Carolina, detrimental to the public interests; and

Whereas by several provisions of the transportation act, 1920, approved February 28, 1920, the Congress of the United States vested broad powers in the Interstate Commerce Commission which that commission is attempting to exercise with a view to controlling interstate commerce and the instrumentalities thereof and with a view to preventing discriminations against and burdens upon interstate commerce, in such a way as to deprive the several States of their right to regulate, under the police powers, intrastate rates, services, and facilities, and the local affairs of common carriers: Therefore be it

Resolved by the Senate of the State of South Carolina, the House of Representatives concurring, That the Legislature of the State of South Carolina hereby petitions and memorializes the Congress of the United States so to amend the transportation act, 1920, as to eliminate therefrom the rule of rate making, so called, and to so define and curtail the powers of the Interstate Commerce Commission as to protect and preserve the powers of the several State commissions with relation to intrastate rates, services, and facilities and the local affairs of common carriers within the States. And be it further

Resolved, That the clerk of the Senate be, and he is hereby, directed to transmit a certified copy of this resolution to each United States Senator and each Representative in Congress of the State of South Carolina.

CONCURRENT RESOLUTION PASSED BY BOTH HOUSES OF IOWA LEGISLATURE, 1921.

Whereas the recent decision of the Interstate Commerce Commission in the Illinois rate case interprets the Esch-Cummins Act as giving them complete authority over the railways, the entire field of transportation, the traffic itself, and all the instrumentalities and means of carrying it on; and

Whereas it means that the law of the States and their officers are defied and that the Interstate Commerce Commission has assumed exclusive authority over the railways; and

Whereas wheat, corn, live stock, and all farm products are being marketed at a heavy loss to the farmer; and

Whereas the freight and passenger rates are already burdensome to the producers and consumers, with the likelihood that the railroads will ask for further increase in rates, with no consideration apparently having been given in the recent raise as to the low cost of construction and operation in the prairie States, with no completed valuation of the railways, or as to the fact that the railways in these States have

not millions invested in depots and terminals, we consider it unwise to confer upon the Interstate Commerce Commission the greatest power ever given to a body of men in peace times: Therefore be it

Resolved by the senate, the house concurring, of the thirty-ninth general assembly, That we call upon Congress to so amend the transportation act and in such plain language that the authority of the States over intrastate traffic in their respective territories will be maintained without an opportunity for misinterpretation. Be it further

Resolved, That a copy of this resolution be sent to each United States Senator and Congressman from Iowa.

CONCURRENT RESOLUTION PASSED BY TEXAS LEGISLATURE, 1921.

Whereas there is now pending in the various courts of the State, both Federal and State, litigation involving the validity of the constitution and laws of Texas and which will result in testing the validity of the Cummins-Esch bill in its features wherein encroachments are made upon the proper provision and jurisdiction of the railroad commission of Texas, and the constitution and laws of the State of Texas; and

Whereas the attorney general is now faithfully representing the State of Texas to the best of his ability and the means at his hands; and

Whereas we recognize that it is the duty of the lawmaking power of this State to render the proper aid and support: Therefore, be it

Resolved by the Senate of the State of Texas (the House of Representatives concurring): That we commend the attorney general and the railroad commission of Texas in their efforts to uphold the constitution and laws of Texas, and pledge to them all necessary and proper aid and assistance.

The attorney general is authorized to employ such additional assistants as he deems necessary, not exceeding two in number, and assign them to the duties of his office in order that his two assistants handling the railway litigation growing out of the passage of the Cummins-Esch bill may devote their entire time to such litigation.

HOUSE JOINT MEMORIAL NO. 4, PASSED BY BOTH HOUSES OF UTAH LEGISLATURE—STATE RIGHTS OVER RAILWAYS.

To the Senate and House of Representatives of the United States in Congress assembled:

Your memorialists, the governor and Legislative Assembly of the State of Utah, respectfully represent:

That the Interstate Commerce Commission in recent decisions interprets the transportation act of February 28, 1920, as giving that body complete authority over the railways, the entire field of transportation, the traffic itself, and all the instrumentalities and means of carrying it on.

That such interpretation and such assumption of complete and exclusive authority over the railways defies and sets at naught the sovereign rights and laws of Utah, and other States enacted to give the said States proper regulatory supervision over railways within their own borders.

That we believe it unwise and against the interests of the public to vest such power and authority in the Interstate Commerce Commission.

Therefore we respectfully urge that Congress amend the said transportation act so as to provide without possibility of misinterpretation that the authority of the States over railways within their own borders shall be recognized, upheld, and maintained.

Approved March 4, 1921.

JOINT RESOLUTION PASSED BY BOTH HOUSES OF WISCONSIN LEGISLATURE, 1921.

On the part of the several States of the Union, requesting the Congress of the United States to call a convention for the purpose of proposing an amendment to the United States Constitution for the purpose of further strengthening the Tenth amendment to said instrument to further safeguard the self-governing power of the States and to more specifically define the powers of the Federal Government so as to restore to the people the rights of home rule as originally intended by the Federal Constitution:

Whereas the National Government of the United States has during the past several years assumed the exercise of powers both by legislative enactment, Executive order, and even subordinate department order, the latter orders assuming the sanction of law, all of which assumption of power on the part of the said National Government and its agencies is destroying the self-governing rights of the people of the several States and striking at the foundation of the fundamental principles on which the Republic was established. The assumption of said powers to a great degree were justified as in time of war, but the continued application of the principles of same as to peace conditions are unauthorized and unwarrnated. The States have lost control of the regulation of railroads and the rates to be charged thereon on lines within their borders, and such regulation has been assumed by a national body which arbitrarily enforces its decrees. The National Government is constantly seeking by the method of national bonuses to the several States, and by other similar methods, to undermine the self-governing rights of the States and make the National Government supreme, even as to the minor details of regulation.

The foregoing is only a few of the many instances in which the underlying principles on which the Republic was founded are being cast aside, and the flag of national domination has been raised as a standard in place of the self-reliant flag of home rule. The present policy contemplates no longer that the people should uphold the National Government, but that the National Government should uphold the people. The inspiration of a great nation no longer comes from the ranks of the people, but rather issues from the top by national edict. Federal officials are found in every quarter of the land whose duties have heretofore been unheard of. The people are no longer controlling the Government, but the Government is controlling the people. The elasticity of the Republic by which the features adapted to each State and each locality is being slowly and surely destroyed. The day of awakening has arrived, and the growing power of the National Government must be further curtailed by specific constitutional amendment clearly defining the powers of Congress and reserving all other powers to the several States of the Union and to the people, as is contemplated in the tenth amendment to the organic law of the Republic: Therefore be it

Resolved by the senate (the assembly concurring), That the Wisconsin Legislature call upon the legislatures of the several States of the Union to apply to the Congress of the United States requesting that body to call a convention for the purpose of proposing such amendment or amendments having for its or their purpose the preservation of the self-governing rights of the States and the principles of home rule for the people thereof, and to restore to the States and to the people certain rights now exercised by the National Government and the several departments thereof contrary to the intent of the Federal Constitution; be it

Resolved further, That a copy of these resolutions properly attested by the presiding officer of both houses be transmitted to the governor of each of the several States of the Union, with the request that the same be transmitted to the legislatures of the several States now in session and to such sessions of said legislatures which may hereafter be convened.

Mr. BENTON. The Senator from Washington asked me to be sure to mention the Washington case. I have not the time to do that at this point, but, if later, when I am presenting the concrete amendments I am questioned about it, I will be glad to make a full statement about that.

ELECTRIC RAILROADS.

Now, there was also presented a resolution in which Congress was asked to consider the question of electric railroads, and to determine to what extent it desired the Interstate Commerce Commission to exercise jurisdiction over electric railroads. It has shown a disposition to exert the same kind of power over local rates on street railroads that it does on steam railroads. In the William Wylie Beall case, reported in 60 I. C. C., 601, and 63 I. C. C., 221, it made intrastate fares in Ohio to take the place of fares fixed by franchises. The importance of that can scarcely be overstated. If it can exercise that kind of power, the railroads by making joint rates with connecting lines, can bring almost all the mileage of the street railroads of the United States within the jurisdiction of the Interstate Commerce Commission, and we will have street-car fares fixed from Washington.

The CHAIRMAN. That was not done under section 15(a)?

Mr. BENTON. No; it was not; and I called attention to that the other morning. Now, I would like to discuss that at length, but I do not feel that I ought to at this time. In a brief before the Interstate Commerce Commission in that case, I described the character of the case, and talked about it. I have eliminated portions of the brief,

and it is a small brief. Probably it does not contain so many words as I should speak if I attempted to go into a discussion of the case here. If I may, I would like to incorporate that discussion.

The CHAIRMAN. The entire brief, or only that portion of it that relates to that question?

Mr. BENTON. It all relates to that question, but I have eliminated portions of it. If the brief seems to the chairman too long, I will be glad to cut it down more than I have.

The CHAIRMAN. We will examine that and see whether it ought to go in or not.

(The brief referred to is not printed, but a copy is on file with the committee.)

Mr. BENTON. I have here, but do not offer, for the reason indicated by the chairman, the first opinion of the commission. I think that I have stated the effect of it with a good deal of care in my brief before the commission.

The CHAIRMAN. Well, when we come to your proposed amendments, if we think your brief on that question ought to be printed as a part of the record, we will order it printed, but we reserve the privilege of some review on that subject.

Mr. BENTON. That, of course, is as it should be, Mr. Chairman. I have no desire to unduly expand the record. I have merely tried to devise a method by which I could get into the record for examination by everybody interested the matter which I would like to have discussed.

Now, after that report was made, on behalf of the National Association of Railway and Utilities Commissioners, I made a motion for a reconsideration of it, and I was permitted to make an argument before the commission. I set out the far-reaching effect of the decision in that document which I have presented, which I inadvertently called a brief. As a matter of fact, it is my motion for a rehearing of the case. After that argument was made, the commission handed down an opinion on the motion, in which it added nothing new to the discussion, but adhered to its former position and decision. The first decision was by a division, consisting of three commissioners. Commissioner Aitchison was on the division. He dissented. When the matter was before the commission on the motion for rehearing the full commission supposedly sat, but it was determined in August, when the full commission was not actually present. Commissioner Aitchison was not present, and I understand that Commissioner Lewis was not, and that Commissioner Potter was not, Commissioner Campbell joined Commissioner Eastman in a dissenting report which covers only two pages. Because it is the most sensible discussion I have seen from any source as to what ought to be the character of jurisdiction exercised from Washington, I ask to read it as a part of my statement. I have eliminated all other parts of the report.

The CHAIRMAN. Very well. It may be read as a part of the record.

Mr. BENTON (reading):

"Eastman, Commissioner, dissenting:

"I approach this case with the conviction that the activities of this commission should be confined, so far as the law permits, to matters of national consequence. The tendency to overcentralization, unless checked, can only lead to congestion here and to conditions which will sooner or later become intolerable to the people of the country. It is impracticable to handle from Washington with any degree of satisfaction matters which are chiefly of local importance. Nor is the fact that an evil exists which municipal or State authorities have not seen fit to abate necessarily a reason why we should be called or go to the rescue.

"This was, I believe, the underlying thought when the Supreme Court of the United States decided in the Omaha case that street railroads, even when they cross State lines, are not engaged in the interstate commerce 'which Congress had in mind when legislating in 1887,' and hence are not subject to our jurisdiction. In the instant case the majority undertake to use the power of the Federal Government to raise two electric railway fares in Ohio which the local authorities will not permit to be raised. One of these fares applies between two small towns for a distance of about 9 miles the second between two other towns for a distance of about 7.5 miles. I am wholly persuaded that we ought not to undertake to use the power of the United States for such a purpose unless it is clear that Congress intended it to be so used, and that all doubts ought to be resolved against the assumption of such jurisdiction.

"The Ohio electric lines in question are operated under franchises granted to the Bellaire, Bridgeport & Martins Ferry Street Railway and to the Steubenville & Wheeling Traction Co. I am unable to discover any clearly marked distinction between these lines and the street railroad lines in the Omaha case, which the Supreme Court found were not within our jurisdiction. In our decision which the court reversed (West End Improvement Club *v.* O. & C. B. Ry. & B. Co., 17 I. C. C., 239). we described the latter lines as follows, at page 243:

"In the instant case it should be remembered that the defendants have the characteristics of an interurban line as well as of a street railway. They operate 136 single-track miles of road; the rails are not all laid in public streets and highways, but for some distance run over private right of way; they operate over the bridge across the Missouri River and through sparsely settled sections over expensive culverts not conforming to the level of the streets or roads; they carry the United States mail and do not serve the needs of a single city and its suburbs, but of two cities and several towns, villages, and resorts.

"Certainly the electric lines in the present case do not possess the 'characteristics of an interurban line' in any greater degree. Nor have I been able to discover any changes in the interstate commerce act since our order in the above-cited case which have in any degree of clarity or certainty extended our jurisdiction over street railroads.

"However, my objections to the conclusions of the majority are not limited to this question of jurisdiction. I realize that there have been numerous decisions of the commission which are inconsistent with a strict interpretation of the Omaha case. But if we possess any power to override the will of Ohio municipalities and compel the raising of electric railway fares which these authorities, however mistakenly, will not permit to be raised, most assuredly it is only when unjust discrimination against interstate commerce or persons or localities engaged therein has been definitely established. In the instant case evidence of substance is wholly lacking that persons or localities engaged in interstate commerce are suffering injury because of the low intrastate fares or that the course of interstate commerce is in any way impeded. Such evidence as we have was presented chiefly by the ostensible defendant, the Wheeling Traction Co. No one else manifests serious concern for the protection of interstate commerce; its concern is clearly a matter of revenue; and its evidence is largely confined to a showing that the intrastate fares in question are unduly low.

"I am unable to find in the interstate commerce act any intent of Congress that we should have power to raise the intrastate fares of electric railways which happen to be engaged to some extent in interstate commerce, as most of them are, merely because of a belief that such fares are lower than they ought reasonably to be and in the absence of evidence that the free course of interstate commerce is in any substantial way obstructed or hindered. The complaint should be dismissed.

"I am authorized to state that Commissioner Campbell concurs in these views."

The CHAIRMAN. It is a case of Daniel come to judgment.

Mr. BENTON. Yes. He is not so lonesome as Daniel was, but he is an unfortunate minority. But I do not present it for that reason; I present it for the consideration of the reasoning contained in it, by anybody who is called upon to act on the matters involved here.

Mr. THOM. Mr. Chairman, may I ask if the majority opinions have been put in this record?

The CHAIRMAN. I did not understand you, Mr. Thom?

Mr. THOM. Have the majority opinions in these cases been put into the record?

The CHAIRMAN. As I said before, we will determine that when we get to the amendments that he proposes. So far as these latter papers are concerned, we will put them in the record if we think they shed any light on the subject.

Mr. THOM. I merely want to call attention to the fact that the Interstate Commerce Commission should not be tried on the minority opinions without the majority opinions being there also.

The CHAIRMAN. Well, the committee will inform itself with regard to the character of these orders and decisions. Now, if we can do it properly without printing all that has been said by the Interstate Commerce Commission we will not print it, but it will be necessary, of course, for the committee to become familiar with what the Interstate Commerce Commission has done and said.

Mr. THOM. Of course, this is for the Senate and the country, and if the minority reports alone go in——

The CHAIRMAN (interposing). You understand Mr. Benton offers the minority opinion for the value of its reasoning. That is all. He is moving here for a change in the law. We will probably have to accept the majority opinion so far as the effect is concerned, and I assume that the minority will. When we are considering a change in the law, we will consider it for the purpose of considering whether it is necessary to have a change in the law.

Mr. THOM. The point that I make, and that I would be glad to have the committee consider, is that if the question is as to a change in the law, and any criticism is made of the actions of the Interstate Commerce Commission, that both sides of that question ought to be in the record, and that the minority opinions alone ought not to be resorted to for the purpose of determining whether there ought to be a change in the law. It is

hardly fair to the commission, for whom I hold no brief, of course; I do not represent them——

The CHAIRMAN (interposing). The way I look upon that is that what the commission has decided, it has decided. And if there be no change in the law, either by subsequent action or by legislation, we must assume that the commission will continue to do what it has already declared it to be its duty to do. And therefore the majority opinion would be looked upon logically for the purpose of discovering what the commission has actually decided, and the minority opinion would be examined for the purpose of ascertaining whether or not any change in the law is desirable.

Mr. BENTON. I feel sure that Judge Thom will be willing to leave with the committee itself whether or not this should be printed, if he understands that I have presented both the majority and minority reports. My request goes to the minority report, but the committee, I am convinced——

The CHAIRMAN (interposing). The committee will determine that.

Mr. THOM. I just want to say this, Mr. Chairman: I understood the committee to grant the motion made by the witness that the minority opinion should be put in the record. I understood that that was an announced ruling of the chair. The point that I want to make, and I would like to present to the minds of the committee here, is that if that is to be alluded to for the purpose of showing the strength of the reasoning against the law, it is not fair to the great public body, and not fair to the question that what I have said on the other matter be not in the record, and subject to the same examination by the people who will examine the record for light on this subject.

The CHAIRMAN. All that we desire is to limit the printing as much as possible consistent with a full understanding of the case.

Mr. BENTON. I want to say that the majority reports, while considerably longer than the minority, are not extremely long, and it would be very pleasing to us to have them all included. But I have felt that it was the desire of the committee to limit the printing, and therefore I have not asked for anything excepting dissenting reports.

CAR SERVICE.

Now, I come, Mr. Chairman, to the resolution relating to car service. The resolution itself so well expresses the views of the State commissions on this subject that I will read it. It is very brief. [Reading:]

"Whereas it is impracticable for the Interstate Commerce Commission to attempt to supervise the distribution of cars as between individual shippers throughout the United States; and

"Whereas there should be some governmental authority within reasonable reach to which appeal can be made to require equitable distribution of cars without regard to whether the same are to be used for shipments interstate or intrastate: Therefore, be it

"*Resolved*, That Congress be respectfully urged to amend the interstate commerce act in such way that the regulatory authorities of the States may make reasonable orders and regulations, not in conflict with Federal law, or with lawful orders of the Interstate Commerce Commission, requiring cars within the respective borders of such States to be equitably distributed to shippers desiring same, without regard to whether they are desired for use in shipments that are interstate or intrastate."

That states the situation so well that little need be added, I think, by way of argument. The Interstate Commerce Commission has not attempted in a general way to do anything toward requiring equitable distribution of cars as between individual shippers. That, at times, becomes an exceedingly important part of regulation. Especially is that so in the grain States. It is not practicable—nor should there be any occasion for an attempt—to base any orders concerning such distribution on the intrastate or interstate character of the shipment to be made. What is necessary is to have a tribunal that can be easily reached at small expense, that can act quickly.

For the purpose of guarding against any failure to understand just how these matters usually are handled, I want to say that they are not usually handled by formal orders at all. Perhaps not once in a thousand times does the action of a State commission take the form of a formal order. An application is made to the State commission saying that so and so has made application for cars, and that he does not get them, and that a neighboring elevator is getting them, or that the next town or the next city somehow or other gets cars, and they do not. The State commission can have a man on the spot that day, or the next day, or can step to the telephone and ask for a report from the carriers, and can say, "You must get some cars over there." And they are gotten there. The relief is obtained.

Now, there is no reason why any nice legal question should be thought of at a time like that. There is no desire here to impair in any degree whatever the full and complete control of the Federal commission over car service relating to the interstate business of the country. The Interstate Commerce Commission must have the authority to reach its hand into one State and take cars out of that State, even though the people want them there, and put them into another State, if they are more needed there for the business of the country. All that is asked is that the State commissions be permitted to function with respect to local situations so long as they do not make any orders or requirements which interfere with the orders of the Interstate Commerce Commission lawfully made under this act, or with a rule which the Congress itself has put into the act. That proposition is so inherently reasonable that I think probably no question will arise about it, unless somebody raises a question as to the constitutional power of Congress to authorize a State commission to make orders with respect to cars which may be desired in interstate shipments.

It is fortunate that this exact question was considered by a very able lawyer who was at one time on the Public Service Commission of Massachusetts, and later on the Interstate Commerce Commission and who is now on the Federal bench in Massachusetts. I refer to Judge George W. Anderson. In an address delivered before the National Association of Railway and Public Utilities Commissioners in November, 1920, here in Washington, Judge Anderson advocated the passage of Federal legislation which would give to the State commissions general jurisdiction locally as regional Federal tribunals, and he discussed the legal aspect of it. He cited some cases, which I will put into the record:

(The cases are as follows:)

"Levin *v.* United States, 128 Fed. 826; Holmgren *v.* United States, 217 U. S., 509; Dallemagne *v.* Moisan, 197 U. S., 169; In re Spangler, 11 Mich., 298; In re Griner, 16 Wis., 447; Druecker *v.* Salomon, 21 Wis., 628, 638; Allen *v.* Colby, 47 N. H., 544."

The CHAIRMAN. Mr. Benton, may I interrupt you a moment? Of course time every morning is very limited. Could you not come to the changes in the law which you want to have made and leave us to examine these authorities, if you will just file a brief of them?

Mr. BENTON. Well, I was just putting the cases in. I would say that he reached the conclusion that the Federal power was ample. If anybody wants to look at his address, which is a very able one, it is to be found in the report of the national association at its convention last year, and the part I have in mind is at page 37. That, in view of the suggestion of the Chairman, is all that I will say on that point.

MULTIPLE VALUE OF RAILROAD LANDS.

Now with respect to another resolution asking for amendment to the valuation act I do not want to say anything except that there is a bill already pending before the Senate, introduced by yourself, Mr. Chairman, S. 539, which is the same bill as H. R. 13997 before the Sixty-sixth Congress on which very voluminous hearings were held. Those hearings have been printed and are available for inspection. There have been two hearings on the bill pending in the Senate at this session, one May 12 before the subcommittee, and another June 10 and 11 before the full committee, both of which have been printed.

The CHAIRMAN. Well, that relates to the valuation act.

Mr. BENTON. Yes.

The CHAIRMAN. I do not think we ought to bring that into this hearing. We have already heard it fully, and the subcommittee has reported upon it, and I am doing my best to get a report of the full committee upon it.

Mr. BENTON. I merely desire to call attention to the resolution which we present on that matter, and to say that upon a matter where there is such unanimity of judgment upon the part of all officials, it is the one thing where, so far as I know, there is not a State commissioner in the country that thinks the law should remain as it is now. It has been a matter that the State commissions have been interested in ever since the carriers began to attempt to secure this multiple value of land. As the resolution rehearses, the carriers under the proposed bill will get the full present value, even though the land was given to them by the Government.

The House bill was referred to the Interstate Commerce Commission, and the Interstate Commerce Commission unanimously approved it, and sent the chief counsel both before the House committee and before your committee. The law of the matter, aside from the compulsion of the existing act of Congress, was declared by the United States Supreme Court in the Minnesota case, and the State commissions feel that your bill certainly would be reported out if the Senators could find time from their other duties to take it up.

The CHAIRMAN. It will be reported out as soon as I can get a majority of the committee to agree to it.

Mr. BENTON. And as the other members of the committee have not agreed to it we draw the inference that it has not come to their attention. We call attention to it and to the immense importance of it, as bearing upon what the people of this country will pay in rates in the future. It is a question of whether some billions of dollars will be pumped into the aggregate value. It is especially important, if section 15 (a) shall stand in the law, that this bill shall be acted upon by Congress. I take note of the intimation of the chairman that I should not discuss that matter, and I refrain from doing so.

PROPOSED CAR SERVICE AMENDMENT.

I now pass to the amendments in concrete form which we would propose. Taking up, because I think it will give occasion for the least discussion, the amendment under the resolution relating to car service, I offer the same for incorporation into the record without reading it.

The CHAIRMAN. Read it, Mr. Benton. I want to hear it.

Senator FERNALD. That is the most important part of this whole discussion, Mr. Benton. We ought to consider that, I am sure.

The CHAIRMAN. He is speaking of car service now.

Senator FERNALD. I mean his suggested amendment.

Mr. BENTON. My assumption is that either the committee itself would amend one of the existing bills or make a new bill, and accordingly I have not put these suggestions into the form of a bill, but of sections for a bill.

The CHAIRMAN. Precisely.

Mr. BENTON. I will read the proposed amendment under resolution relating to car service:

"SEC. —. That paragraph (17) of section 1 of the interstate-commerce act, as amended, be amended by adding thereto the following: '*And provided further*, That any State, by action of its appropriate regulatory authorities, may make reasonable orders and regulations requiring cars within its borders to be distributed equitably to shippers desiring to make shipments therein, without regard to whether such shipments are to be intrastate or interstate, except that no requirement shall be made under this proviso which shall conflict with any provision of this act or with any lawful order of the commission.'"

PROPOSED AMENDMENT RELATING TO ELECTRIC ROADS.

The amendment under resolution relating to electric railroad rates is as follows:

"SEC. —. That paragraph (1) of section 15 of said act be amended by adding thereto the following: '*Provided, however*, That no street, suburban, or interurban electric railroad shall be subject to the jurisdiction of the commission unless the same shall be engaged in the general transportation of freight, which it interchanges with connecting lines.'"

I ought to call attention to the fact that the resolution of the national association merely requests Congress to direct its attention to the matter and to select the class of electric roads which it desires the Interstate Commerce Commission to exercise jurisdiction over, and to make that clear I will say that being asked to present a concrete amendment I have drawn one intended to conform the law to the opinion of the Supreme Court in the Omaha case, which I cited the other day.

The CHAIRMAN. Well, that is not as broad as the exception that we put into the transportation act controlling certain parts of that act.

Mr. BENTON. Yes; I am aware of that. But I present the same with this indication that there is no settled view, which the state commissions want to press upon Congress, as to the extent of the jurisdiction which should be given the Interstate Commerce Commission over electric roads. My personal belief is that Congress has never expressed the intention to delegate to the Interstate Commerce Commission any power over anything except roads that carry on a general interstate business of the character described in the Omaha case, which is the character of business carried on by steam railroads in 1887. This amendment, however, would by implication extend the jurisdiction of the Interstate Commerce Commission to that character of interurban roads which the court in the Omaha case referred to but did not decide about—that is, to roads that carry on a general freight business which they interchange with connecting lines.

CERTIFICATES PERMITTING CONSTRUCTION AND ABANDONMENT.

I have prepared [illegible] with me an amendment relating to certificates of [illegible] which would incorporate a single sentence

in the appropriate section of the interstate commerce act, to the effect that the certificate obtained from the Interstate Commerce Commission shall not relieve the carrier obtaining the same from conformity to the laws of the State with respect to construction, operation, and abandonment. That would conform with the resolution which has been offered. There has been much discussion on that subject.

The CHAIRMAN. Well, that would neutralize it entirely.

Mr. BENTON. No. Excuse me for so dogmatically answering any suggestion that comes from you, Senator. The law then would require the Interstate Commerce Commission to pass upon these extensions and abandonments, but would not relieve carriers from conformity to State laws. If the purpose of the law was to relieve them absolutely from the effect of State law, to that extent it would neutralize the act. But if the intent was to grant to the Federal Government authority to veto propositions to construct, extend, or abandon lines it would not neutralize it.

The CHAIRMAN. Well, the State law is that the railroad can not abandon a line within that State without the consent of the State.

Mr. BENTON. Yes.

The CHAIRMAN. That is the State law.

Mr. BENTON. Yes.

The CHAIRMAN. We have said in the transportation act that it can abandon any such line doing an interstate business upon the authority of the Interstate Commerce Commission, so I rather adhere to my conclusion that it would destroy the power that we have given to the Interstate Commerce Commission.

Mr. BENTON. The amendment which I will propose will strike out simply the sentence in the act which provides that having obtained the certificate it may proceed without any other authority whatever, and insert a sentence which is directly contrary in intent.

The CHAIRMAN. Precisely.

Mr. BENTON. But, having done that, however, the situation will still be that, whereas before you passed the transportation act a company might abandon a line or build a line without getting the consent of the Interstate Commerce Commission, it could not do it any more—it could not do it after this amendment any more than it can now.

The CHAIRMAN. The final judgment of the propriety of the abandonment of a line would, under your amendment, be in the State?

Mr. BENTON. Yes.

The CHAIRMAN. And not in the Interstate Commerce Commission?

Mr. BENTON. Yes; that is right, Senator; and while I had not expected to take time to discuss this, I am glad to. The States think that when States, counties, municipalities, and individuals have contributed to help build these roads, and the State has developed along the lines after they are built, that the Federal Government ought not to authorize their abandonment.

The CHAIRMAN. I am not passing on the merit of it at all.

Mr. BENTON. And to illustrate the idea: In my city of Keene, in New Hampshire, when that city was only a town of five or six thousand inhabitants, it voted a bond issue of $225,000 to help build the Manchester & Keene Road, then a purely intrastate road running between intrastate points. It has now become a part of the Boston & Maine system. To the State authorities it seems unthinkable that the Federal Government will authorize the Interstate Commerce Commission to say that a road of that character may be torn up, and the salvage value pocketed, and the corporation walk away.

The CHAIRMAN. Well, I understand that. I am not passing upon the propriety or wisdom or even authority for giving that power to the Interstate Commerce Commission. I am only commenting upon the effect of your amendment. There is much to be said in favor of your proposition.

Mr. BENTON. It is the thought of those who present the proposition that the carriers are now fully protected under the law by the courts. It has been held by the Supreme Court that if operations are so expensive and revenues so small that continued operation operates as a confiscation of the property the carrier has a constitutional right to take up its track without authority from anybody, and it is their thought that the question of whether a road should be taken up if the State does not consent ought to be judicially determined, and not determined by a Federal administrative board.

The CHAIRMAN. Precisely. I understand the position all right.

PROPOSED AMENDMENTS TO SAFEGUARD STATE CONTROL OF INTRASTATE RATES, AND TO REPEAL SECTION 15A.

Senator FERNALD. Mr. Chairman, we have only a few moments more this morning. May I ask the witness just this: It has been the contention of all those representing the State commissions, Mr. Benton, that the Interstate Commerce Commission had either misinterpreted the language or had exceeded the authority given them in the transportation act. I understood that you were to suggest some amendment to clarify the language and end that situation. Have you any other amendment?

Mr. BENTON. I have, Senator; and have just arrived at it.

Senator FERNALD. We have got about 10 minutes now to discuss that one contention, the most important of all.

Mr. BENTON. I just did not want to have the committee lose sight of those other resolutions.

I now read amendments proposed under the resolution relating to amendment of the rate-making sections of the interstate commerce act, as amended by the transportation act:

"SEC. —. That paragraphs (3) and (4) of section 13 of the interstate commerce act, as amended, be amended to read as follows: '(3) Whenever in any investigation under the provisions of this act there shall be brought in issue"—I will interject that the right of the carrier to institute these proceedings is eliminated—"any rate, fare, charge, classification, regulation or practice made, imposed, or required to be kept in force by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding."

To that point the law is unchanged, except in the respect I noted. [Continuing reading:]

"Before making any finding that the imposition or keeping in force of such rate, fare, charge, classification, regulation, or practice is within the inhibition of any provision of this act, the commission shall confer with the authorities of such State or States, so notified, having regulatory jurisdiction over the class of persons and corporations subject to this act, or afford opportunity for conference, concerning the relationship between rate structures and practices of carriers subject to the jurisdiction of the State and Federal authorities, respectively, and the effect of the same upon the person or persons or locality or localities engaged in interstate commerce claimed to be injured thereby, with a view to a full understanding of the entire situation by both State and Federal authorities, so that such structures and practices may be brought into harmony by any necessary changes in the same, through action of either State or Federal authorities, or both, without the making by the commission of an order of the character authorized in paragraph (4) of this section, and to that end the commission is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State authorities, on any matter wherein the commission is empowered to act. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act.

"(4) Whenever after any such investigation and a full hearing the commission shall find that the imposition or keeping in force of any particular rate, fare, charge, classification, regulation, or practice made, imposed, or required to be kept in force by any State constitutes a discrimination within the inhibition of this act, which can not be removed in the manner contemplated by paragraph (3) of this section, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed by the carrier or carriers theretofore found to have discriminated, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination, and such carrier or carriers shall thereafter observe the same, while the order of the commission continues in effect, the law of any State, or the decision or order of any State authority to the contrary notwithstanding: *Provided*, That no rate, fare, charge, classification, regulation, or practice applicable to the transportation of persons or property in intrastate commerce, made, imposed, or required to be kept in force by authority of any State, shall be set aside, or held to be within the inhibition of any section of this act, solely by reason of the fact that it yields to the carrier a different revenue from that received for corresponding mileage from the interstate rate with which it is compared, but only if the same shall be found from competent evidence to injure a person or persons, or a locality or localities, engaged in interstate commerce to such an extent as seriously to diminish the business of such person or persons or seriously to retard the growth and development of such locality or localities; and unless the same shall also be found from competent evidence to be unreasonable

and noncompensatory in such State under honest, efficient, and economical management and operation: *Provided further*, That whenever the commission shall make any order prescribing any rate, fare, charge, classification, regulation, or practive, for intrastate application it shall make a report of the facts found from the evidence in the record, upon which it bases the findings hereinbefore provided for: *And provided further*, That no order of the commission, made under the authority of this paragraph, prescribing any rate, fare, charge, classification, regulation, or practice shall operate to prevent the exercise by any State of its regulatory power with respect thereto for a longer period than two years from the date when said order shall become effective."

Another section declaring the purpose of Congress to recognize the continued right of the States——

The CHAIRMAN (interposing). Well, that reverses the Shreveport doctrine.

Mr. BENTON. Which does?

The CHAIRMAN. The amendment which you have just read.

Mr. BENTON. I think not, Senator.

The CHAIRMAN. It does in this respect, if I get it correctly as you have read it, that the Shreveport doctrine does not require the Interstate Commerce Commission to find that the State rate is unreasonable or non-compensatory. And in that respect my first impression is that it is a reversal of that doctrine.

Mr. BENTON. Senator, it is true that it has been held explicitly by the Supreme Court that in a discrimination case the question of the reasonableness of the respective rates is not in issue. The question is that of discrimination. That was decided in the case of American Express Co. *v.* Caldwell, the South Dakota Express case, which I think has been cited in the record. The purpose of this provision is to make it an issue to this extent only, that the Interstate Commerce Commission shall not set aside a State rate without inquiry as to its reasonableness, as it has been doing in these cases, but shall consider whether in fact it is reasonable. If it is reasonable it shall make such adjustment in the interstate rate as is necessary in order that both rates may be reasonable and fair.

The CHAIRMAN. Now, one or the other issue must dominate. It must be either the issue of discrimination or the issue of reasonableness per se. Now you intend by that amendment, I assume, that the Interstate Commerce Commission must find, first, that the rate does discriminate against a person or locality and injuriously affect the interstate business of that person or that locality; and second, that it must find that the rate is unreasonable in itself, and I assume that you test the reasonableness of a rate, under your amendment, by its revenue-producing effect.

Mr. BENTON. Yes.

Senator FERNALD. But in either event, it is left with the Interstate Commerce Commission as to determining whether it is reasonable or whether discriminatory, so that it is left to the same court—the effect would be the same?

The CHAIRMAN. The result would be or could be very easily that if the Interstate Commerce Commission would find that it discriminated and injured some person or locality engaged in interstate commerce, but at the same time might find that it was a reasonable rate so far as producing revenue is concerned, and in that event the Interstate Commerce Commission could give no remedy.

Mr. BENTON. Going back, Senator, to the Iowa example, which you gave me the other day, under this amendment if the Iowa commission cut the rate in two for the benefit of the Iowa shipper, of course that would produce an unreasonable rate and the Interstate Commerce Commission could cure it. But under this amendment, if the Interstate Commerce Commission, upon investigation, found that the Iowa rate was a fair rate, and that the interstate rate which had been filed by the carriers, allowed to become effective on 30 days' notice without action of the Interstate Commerce Commission, or which had been passed upon without due attention by the Interstate Commerce Commission, was higher and on an unreasonable basis, they would correct the interstate rate without bringing them both up to the unreasonable and improper level.

The CHAIRMAN. That the Interstate Commerce Commission ought to do under the authority it has now.

Mr. BENTON. It ought to do it, and we want the law to require them to do it.

The CHAIRMAN. But you give the Interstate Commerce Commission specific authority to inquire into the reasonableness of the State rate, not into the reasonableness of the interstate rate. I take it that it has authority to inquire into the latter now.

Mr. BENTON. Yes.

The CHAIRMAN. And you mean by your amendment that if it finds, first, that the State rate is discriminatory, and second, that the carrier can do business under the State rate and make a fair return upon whatever basis may be assumed, then, then there is no remedy?

Mr. BENTON. There is remedy enough, Senator. There is remedy in correcting the wrong interstate rate. The trouble with the present situation is that the Interstate Commerce Commission proceeds upon the assumption that if there is a difference which causes what they see fit to call a discrimination, that the fault lies with the State rate. It is a good deal more likely to be the other way, because the State bodies have a lesser jurisdiction, and know their local situations better, and are much more likely to have fixed their rates right.

The CHAIRMAN. Why do you not write into your proposed amendment the thought that you have just expressed, namely, that if it finds a discrimination exists, that then it shall inquire into the interstate rate and ascertain whether that or the State rate is wrong.

Mr. BENTON. This is a limitation, Senator, upon the power of the Federal commission to act with respect to intrastate rates. Congress is delegating the power to the Interstate Commerce Commission to strike down a State rate, and what we are asking is that that delegated authority shall be limited. There is no occasion for inserting in the language delegating that authority any specification as to the power and duty of the commission with respect to interstate rates. Those are taken care of in other sections of the law, and are complete. It is the power and duty of the Interstate Commerce Commission to make all interstate rates just and reasonable. All that we aim to do in this provision is to delegate that authority to the Interstate Commerce Commission with a limitation, the limitation being that if they find a discrimination—such as you see fit to describe—exists, which does operate, on account of the difference in the rate, to the disadvantage of somebody in interstate commerce, they shall examine to see whether that undesirable situation arises from any fault of the State, and if the State has conformed to its duty of allowing a fair and reasonable rate to carriers, it shall not strike down the State rate.

The CHAIRMAN. Well, do you assume that in case a discrimination is found by the commission, under the terms of your amendment, which are just precisely the terms of the present law, that both rates, the State rate and the interstate rate, can both be reasonable?

Mr. BENTON. I assume, Senator, that they will both be made reasonable.

The CHAIRMAN. Well, I am speaking now about a case in which the State rate is so much lower than the interstate rate that the Interstate Commerce Commission finds that one doing business outside the State is unreasonably prejudiced and disadvantaged, and therefore a case of discrimination exists. Now, either the State rate or the interstate rate is wrong, isn't it?

Mr. BENTON. Yes, sir.

The CHAIRMAN. And ought to be changed?

Mr. BENTON. Yes, sir.

The CHAIRMAN. Now, all you want is that the Interstate Commerce Commission shall consider which one of those is wrong?

Mr. BENTON. Yes. Having found the situation, if it finds the State rate is all right it should not have the power to touch that State rate, but it should direct its attention under its general powers in other sections of the act to correcting the interstate rate.

The CHAIRMAN. But you agree that in the case I put both rates can not stand?

Mr. BENTON. Discriminatory rates ought not to exist under any form of government, and we do not seek to have them.

The CHAIRMAN. No.

Mr. BENTON. I want to say that it is my genuine belief that if paragraph 3 is drawn over again in the form that is here suggested, there won't one case in a hundred offer any occasion for an order from the Interstate Commerce Commission, because the State bodies are anxious to have our Government work well and to have right rates

The CHAIRMAN. I want to get your idea fully. If any change is necessary in the present statute it is your opinion that it should be of this kind, that when the Interstate Commerce Commission finds discrimination, that it shall have the power to remove the discrimination, either through the modification of the State rate or the modification of the interstate rate?

Mr. BENTON. Yes. Mr. Chairman, that is now in the law, and that particular feature of it we are not asking to have changed, because we know how thoroughly you considered it. I do not want to concede that I think that that is constitutional. Perhaps I will want to say some day that the power to make an intrastate rate is not a power that the Federal Government can exercise. But it has attempted to exercise it. We are not asking you to change it.

The CHAIRMAN. No; I think I get your idea.

Mr. BENTON. Now there are two or three other sections to completely cover that resolution, that I would like to read:

"SEC. —. That section 1 of the interstate commerce act, as amended, be further amended by adding thereto a new paragraph as follows: '(25) That it is hereby declared to be the policy of Congress to recognize the right of the several States to exercise full and final jurisdiction over the internal commerce of said States, respectively, and over the rates and services applicable to the transportation of the same, subject only to the necessary protection of interstate commerce, provided for in paragraph (4) of section 13 of this act.'"

"SEC. —. That no order of the commission heretofore made prescribing any rate, fare, charge, classification, regulation, or practice in intrastate commerce shall be of any effect after the expiration of a period of ninety days from the passage of this act, but the commission, within such period, upon consideration of the record in any proceeding wherein any such order has been made, and without further hearing may, within the limits of the power granted by said section 13, as amended by this act, make a new report and such new order as may be justified by the facts found therein and supported by said record."

"SEC. —. That section 15(a) of the interstate commerce act, as amended, be, and the same is hereby, repealed."

PROPOSED AMENDMENT RELATING TO CERTIFICATES OF CONVENIENCE AND NECESSITY.

The suggested amendment, which I referred to, relating to certificates of convenience and necessity, I find, and I now read that.

The CHAIRMAN. That is with regard to building new lines?

Mr. BENTON. Yes. Amendment under resolution relating to certificates of convenience and necessity:

"SEC. —. That paragraph (20) of section 1 of the interstate commerce act, as amended, be amended to read as follows: '(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. Such certificate shall not relieve the carrier obtaining the same from conforming to the laws of any State with respect to the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.'"

SECURITY ISSUES NECESSARY FOR IMPROVEMENTS ORDERED BY STATE AUTHORITIES.

Now that completes everything that I want to say with this exception, that I have received from the Transit Commission of New York a memorandum relating to the matter of securities to be issued to take care of improvements ordered by the State commission. The matter is covered in the memorandum, but it is possible that the representative of the New York commission, who desired to come here, can come here later, and if he does, I am sure the committee would hear him. If not, I will present that memorandum and explain it. And I think there is also a communication of the same sort that I shall be asked to put into the record for the commission in Michigan.

The CHAIRMAN. Very well.

Senator POINDEXTER. What is the purpose of the amendment proposed by the New York Transit Commission, just in brief? State the point briefly.

Mr. BENTON. Just in brief it is this: They desire to have such an amendment put into the law that improvements ordered by a State commission which require capital expenditures may not be defeated by a declination of the Federal commission to permit the expenditures. The occasion for their application is that, for the safeguarding of life in New York City, they are obliged to make orders which require considerable expenditures about street crossings. They are concerned lest the State be prevented from exercising effectively that constitutional power which the Supreme Court in the Erie Railroad case, which was argued for the railroads by Justice Hughes and decided very lately, said they had. The court in that case, in an opinion by

Mr. Justice Holmes, said that the right of a State to keep safe the soil it has permitted to be occupied by a carrier, is a constitutional right, and the State can not be deprived of it. The court upheld the orders of the New Jersey commission, which were being contested. But the thought of the Transit Commission in New York is that these important operations, which they from time to time have to require, may be effectively prevented by the exercise of the power of the Federal commission with respect to securities.

If it ever comes to me to present the matter to the committee I shall have some suggestions with respect to the form which an amendment might take, which I think will not interfere with the plan and purpose of the Federal control of securities; but at this time it is impossible for me to go into it.

I would also like, perhaps later, to put in the data called for by Senator Pomerene as to the Ohio coal rate.

(This data is inserted at this point in the form of a letter from Mr. Benton and one from Mr. H. E. Wood.)

WASHINGTON, D. C., *November 2, 1921.*

Hon. A. B. CUMMINS,
Chairman Senate Committee on Interstate Commerce,
United States Senate, Washington, D. C.

DEAR SIR: I have a letter from Mr. H. E. Wood, of the legal department of the Illinois Commerce Commission, in which he refers to an inquiry made by Senator Pomerene of Mr. Slater, who appeared before your committee for the Illinois commission. He states that in section 206 of the Federal Judicial Code, or section 1243 Compiled Statutes of the United States, will be found full authority for an appeal of an interlocutory order against a State by three Federal judges sitting en banc. He asked me to call this to the attention of the committee.

Mr. Wood came here with Mr. Slater to make a statement before your committee, but was obliged to leave without making it, for reasons indicated in a letter of October 31, inclosed herewith, which I assume it is his wish should be placed before your committee in some form. I accordingly ask that it be inserted in the record.

The "case now pending before the Interstate Commerce Commission" involving depreciation funds, to which he refers, is I. C. C. Docket No. 13135, and involves the question whether the Interstate Commerce Commission has jurisdiction over the accounts of the Washington Railway & Electric Co. as an interstate carrier, under the provisions of the interstate commerce act as amended. The company claims to be subject to the act, and claims that the jurisdiction of the Interstate Commerce Commission as to depreciation is exclusive of jurisdiction by the local public utilities commission. The Interstate Commerce Commission has institutted an investigation for the purpose of determining the question involved. I believe, however, that the character of the Washington Railway & Electric Co. is not different in any material way from that of the street railway involved in the William Wylie Beall case, of which I spoke briefly before the committee this morning.

To complete the list of cases where the Federal commission has prescribed intrastate rates, I would say that upon my return to the office to-day I find a report just issued by the Federal commission, but bearing date of October 4, 1921, advancing intrastate rates in Missouri on coal, coke, brick, and articles basing thereon, sand, gravel, stone, crushed rock, chatts, cinders, lime, cement, cement plaster, plaster, and articles basing thereon, and petroleum oil and its products. The published dissenters are Commissioners Eastman, Campbell, and Lewis. The citation of the report is 64 I. C. C., 234.

I want also to complete the reference to the Arkansas case. This I started to do yesterday, but time did not permit, nor did it to-day.

When the Federal commission advanced intrastate passenger fares in Arkansas it withheld action on road-building material for municipal uses, which was also involved in the proceeding, making a reference to the last sentence of paragraph (3) of section 13 of the interstate commerce act similar to that made in the Louisiana case, which I read into the record. The two cases were handled by the same examiner. For a long time after the commission's report nothing was done about the rates on road building material, and it is only within the last 48 hours that I have learned, upon inquiry from the examiner, that on September 13 last a supplementary hearing was held in Little Rock, at which the examiner conducting it asked the State commissioners to sit with him. My answer to Senator Fernald's question as to whether the commission had done this in any case was accordingly inaccurate to this extent.

The Arkansas commission is one of the two or three State commissions that I have not represented, and I did not know about the September 13 hearing until I made the inquiry mentioned.

I can not refrain from calling attention to the fact that the examiner advises me that he has a very good understanding with the Arkansas commission, and is entirely confident that there is going to be no difficulty whatever in reaching a complete agreement as to rates applicable to road-building material which will be entirely acceptable to both commissions. In this case, where the Federal commission has seen fit, to the extent mentioned, to make use of the cooperative provisions of the act, it will accordingly be seen that they would seem to have operated to remove any necessity for a Federal order destructive of State power of regulation.

President Harding uttered a striking truth when he said "What the world needs is understandings."

I shall be glad if this letter may be printed in the record as supplementary to my statement.

Yours, very truly,

JOHN E. BENTON,
General Solicitor.

CHICAGO, ILL., *October 31, 1921.*

Hon. JOHN E. BENTON,
General Solicitor National Association Railway Utility Commissioners,
Eighteenth Street and Pennsylvania Avenue, Washington, D. C.

MY DEAR MR. BENTON: May I suggest that in connection with the testimony of Mr. H. M. Slater, rate expert of the Illinois Commerce Commission, before the Commerce Committee of the Senate of the United States on October 27, 1921, the following conclusions seem to be irresistible:

I. That it is an economic and industrial fallacy to attempt to restore business, industrial and farming prosperity in the United States, and particularly in Illinois, with the transportation systems of the State controlled by a national regulatory body unless in conjunction therewith, although operating separately under the jurisdiction of the State, there is a local regulatory body so equipped that it can reach to and remove discriminations in rates and service on each and every local switch track, industrial track, or service track where commerce originates; that you can not have community prosperity unless you have the prosperity of the individuals in the community; that you can not have or restore State prosperity without you have prosperity in each of the communities of the State; that you can not have national prosperity unless you have prosperity in the several States of the Nation; that the theory of the Interstate Commerce Commission of centralizing and nationalizing control in Washington over the entire transportation systems of the country, both interstate and intrastate, is fallacious in that it tends to restore prosperity from the general group downward to the individual while the entire organization of the United States and the several Commonwealths is an organization individual in its nature; that each individual case demands speedy, efficient, and local understanding to solve the same in such a manner that local confidence will be restored and commerce begin to move.

II. That whether or not the intention of Congress was not to change the interstate commerce law as it then existed by the enactment of the present transportation act, yet the fact is apparent that, as generally construed by the people of the United States, section 15(a) is the expression of an obligation to maintain such a rate for transportation of freight and passengers as will return to the several railroads of the United States a certain fixed percentage.

III. That while the Supreme Court may refuse the construction of the transportation act as adopted by the Interstate Commerce Commission, yet in the present emergency where social, industrial and economic balances in the several communities of Illinois and the United States are so disturbed as to destroy confidence and add to the difficulty of readjusting industrial conditions, the Congress of the United States, responsible for the passage of the transportation act, should immediately take steps to remove the source of the trouble, even though this may require the entire repeal of the present transportation act.

IV. That whether in the present transportation act or in any act amendatory thereto, or in the act repealing the transportation act, there should be such a declaration of public policy by the Congress of the United States which will immediately and finally determine the jurisdiction of the Interstate Commerce Commission and the State commission in reference to interstate and intrastate commerce in the United States. The necessity for such a declaration is accentuated by the present crisis in industrial conditions in the United States and the desire of all governmental bodies to immediately, so far as humanly possible, remove from the resumption of industry and commerce any unnecessary restrictions.

As you know, the necessity of Mr. Slater and my return to Illinois made it impossible for me to supplement Mr. Slater's remarks before the Senate committee. I am simply hurriedly dictating these observations to you which are the result of

study of the many complaints of carriers, shippers, and industrial concerns in Illinois in relation to the present transportation conditions in this State.

In relation to the case now pending before the Interstate Commerce Commission there is involved the taking over of control of depreciation funds of the several street railways, etc., in the United States, and it would seem that this involves almost as serious a problem as the transportation question. It is my judgment that if the precedent is set, as contemplated in the case now on hearing, the time will not be far distant, unless the transportation act is repealed or radically modified and amended, or public policy declared as to no longer render a basis for the centralization idea, that we will find our telephones, electric lights, and practically all other local service rendered by large utilities operating under the direction of the Interstate Commerce Commission.

Any further assistance that I can be to you in either or any of the above matters I will most cheerfully contribute for what, in my judgment, is absolutely essential to the public interest.

Very truly, yours,

H. E. WOOD,
Supervisor of Orders.

The CHAIRMAN. At this point we will be compelled to take a recess until to-morrow morning at half past 9, at which time Mr. Marsh will be heard for a half hour, and following him we will hear Judge Cowan.

(Whereupon at 11 o'clock a. m. an adjournment was taken until Thursday, November 3, 1921, at 9.30 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920

HEARINGS

BEFORE THE

U.S. Congress. Senate.

COMMITTEE ON INTERSTATE COMMERCE, UNITED STATES SENATE

SIXTY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1150 AND S. 2510

BILLS TO AMEND THE TRANSPORTATION ACT, 1920, AND FOR OTHER PURPOSES

NOVEMBER 3 TO 28, 1921

PART 2

Printed for the use of the Committee on Interstate Commerce

WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

73337

COMMITTEE ON INTERSTATE COMMERCE

ALBERT B. CUMMINS, Iowa, *Chairman.*

CHARLES E. TOWNSEND, Michigan.
ROBERT M. LA FOLLETTE, Wisconsin.
MILES POINDEXTER, Washington.
GEORGE P. McLEAN, Connecticut.
JAMES E. WATSON, Indiana.
FRANK B. KELLOGG, Minnesota.
BERT M. FERNALD, Maine.
JOSEPH S. FRELINGHUYSEN, New Jersey.
DAVIS ELKINS, West Virginia.

ELLISON D. SMITH, South Carolina.
ATLEE POMERENE, Ohio.
HENRY L. MYERS, Montana.
OSCAR W. UNDERWOOD, Alabama.
A. OWSLEY STANLEY, Kentucky.
KEY PITTMAN, Nevada.

PAUL MOORE, *Clerk.*

LIBRARY OF CONGRESS
RECEIVED
NOV 10 1924
DOCUMENTS DIVISION

HE2757
1922
.A4

MODIFICATION OF THE TRANSPORTATION ACT, 1920.

THURSDAY, NOVEMBER 3, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will come to order. Mr. Marsh, the committee will hear you. As I have suggested to other witnesses appearing before the committee at this time, we are conducting a hearing upon Senate bill 1150 and Senate bill 2510, the former introduced by Senator Capper and the latter introduced by Senator Nicholson, of Colorado. You will, of course, confine your observations to one or the other of those bills, or the points or questions raised in those bills. This is not a hearing upon the general matters which have, during the summer and fall, indeed, occupied the attention of the committee.

You may state your name and your general connection with this subject.

STATEMENT OF BENJAMIN C. MARSH, MANAGING DIRECTOR OF THE FARMERS' NATIONAL COUNCIL, AND EXECUTIVE SECRETARY OF THE PEOPLES' RECONSTRUCTION LEAGUE, BLISS BUILDING, WASHINGTON, D. C.

Mr. MARSH. My name is Benjamin C. Marsh, and I appear as managing director of the Farmers' National Council, and as executive secretary of the Peoples' Reconstruction League. Our headquarters are in the Bliss Building, here in Washington.

Mr. Chairman and members of the committee, I am sorry that there is such a small attendance of the committee here, but I realize how difficult it is to get a full attendance at the committee hearings.

The CHAIRMAN. I apologize for it, but I am unable to prevent it.

Mr. MARSH. I realize that, Mr. Chairman.

In view of your statement, Mr. Chairman, of course I shall try to confine myself as closely as possible to these two bills. Needless to say, every farmer who is paying freight rates—and that means every farmer, because they have to advance the freight rates out of the prices which they get—as well as every consumer, is opposed to the Cummins-Esch law, and very particularly to that section of it known as section 15 (a), which provides for a fixed return for a time upon the general capital investment account of the railroads, and which then attempted to establish the principle of fixing freight rates so as to yield a given return.

I want to put into the record at this point the fact that both the National Grange and the American Farm Bureau Federation, assumedly farmer organizations, indorsed the Cummins-Esch law, and although both of these organizations indorsed the law through their alleged spokesmen, assuming to speak for the farmers, the farmers have seen the futility of any such plan, and I am informed in their publications that the American Farm Bureau Federation now also urges the repeal of the Cummins-Esch law. I do not want to put matter into the record that has already appeared, and I therefore will ask whether certain matter has appeared in the record, as I have not been able to attend the hearings and have been unable to get a transcript of the hearings. I ask whether you have had put into the record quotations from the decision of the Interstate Commerce Commission on the interstate rates on grain, grain products, and hay, in carloads, between points in the western and mountain-Pacific groups, in which they discussed the guaranteed dividends and the rates.

The CHAIRMAN. We have all seen the order and opinion. It has not been incorporated in the record, as I understand it.

Mr. MARSH. I want to quote briefly from it. There is a brief citation which I want to make from that decision, because it expresses our opinions and thoughts quite thoroughly.

The decision says, in part [reading]:

"The purpose of section 15 (a) was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. It is plainly our duty to do everything in our power to carry out this purpose. The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15 (a), to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers. The rate adjustment can not with advantage be made dependent upon fluctuations in traffic.

"It is also to be noted that the duty cast upon us by section 15 (a) is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers, nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return.

"The conditions with which we are called upon to deal are extraordinary and unique, since they are the aftermath of a world catastrophe. The sufferings of the western farmers may be ascribed to that fact. The prostration of agriculture in this country is the product of world-wide forces. The high level of freight rates has been an obvious and tangible circumstance which has quite naturally been a target of dissatisfaction, but we are not persuaded that it has been more than a minor factor in bringing about distress."

Now, I wish to dissent from that opinion as expressed by the Interstate Commerce Commission, and to say that the high freight rates have been a very extreme cause of dissatisfaction, and a very important factor in bringing about distress. In a way the commission qualifies its own position, for it goes on [reading]:

"Whatever part freight rates may have played at the outset, many qualified to form an opinion entertain the view that the present level of these rates is one of the obstacles in the way of returning prosperity and likewise one of the obstacles to substantial reduction in the cost of living."

Then the Interstate Commerce Commission takes up the question of the earnings of the carriers. The commission, in my judgment, goes entirely outside of the scope of the duties when in this decision it takes occasion to encourage the owners of the railroads to seek a further reduction in wages. That is entirely extraneous to the duties of the Interstate Commerce Commission. And I want to say very frankly that while we are urging the repeal of this section 15(a) of the Cummins-Esch law, both the Farmers' National Council and the Peoples' Reconstruction League, both of whom I represent, and I say that we realize that the high freight rates are not due to the wages paid to railroad labor.

And I want to put in the record at this point this statement: Last May Mr. George B. Hampton, who, until his death during the last summer, was the managing director of the Peoples' Reconstruction League, and I saw President Harding and talked over the situation with him, and we told the President that we had information that the railroad men had compiled evidence of waste and mismanagement on the part of the railroads, and we requested the President formally to transmit the results of this investigation by this railway employees' group to the Attorney General, to prosecute and to seek to recover if possible. The President told us he would do so. We received a letter on May 19, over five and a half months ago, from the President's secretary to the effect that he had transmitted all this evidence to the Attorney General for the purpose of enabling him to make an investigation, and we have not had any word from the Attorney General since that time nor any report from the President as to why the Attorney General does not prosecute.

But, Mr. Chairman and gentlemen of the committee, I would not be justified, frankly, and I would give a wrong impression of the position of the People's Reconstruction League and the Farmers' National Council, and I think I may say quite correctly of the majority of the thoughtful farmers of America—which means a real majority of the farmers of America—if I appeared merely before the committee and seemed to give indorsement only to the repeal of this guaranteed dividend section.

Or, to put it more nearly in the exact language of the section, instructing the Interstate Commerce Commission to fix rates yielding a given return. That is no solution; it is no solution for the ills complained of until you repeal the Cummins-Esch law, and put all the railroads back under a unified government operation. And we have got to regard the railroads, as is indicated in this decision of the Interstate Commerce Commission to which I referred, as being something of more importance than for the purpose of juggling over the rates. We insist that not only should the roads be promptly returned to unified government operation, but that the freight rates should be reduced to those in force when the roads were returned. And, of course, this bears directly upon a proper adjustment of freight rates. If there is any deficit then, make it up by taxing the abnormally large number of war profiteers in this country. I say that the matter of railroading has got to be something more than a merely speculating operation, as it is to-day. The farmers have got to know what they will have to pay for transporting their products.

And we most sincerely hope that this committee will continue the investigation which you conducted during the summer. I even hesitated to ask to appear here for 15 minutes to a half hour on this proposal, because it is of such negligible importance compared with the necessity that the Congress shall promptly reestablish unified Government operation of the railroads.

I do not know why it was—I have tried to find out—that this investigation by this committee—and I do not mean to be personal—was so suddenly stopped after the railroads got in their mass of falsehoods, and statements— and I say that advisedly—because I have had the privilege of examining a great deal of testimony which is yet to be presented to this committee, showing that the railroad executives and representatives presented unqualified falsehoods. And this evidence will be submitted to you. I shall not anticipate facts and figures which I have been shown in confidence. But the case against the railroads is absolutely conclusive. They have mismanaged and wasted and looted, and somebody ought to go to jail. They would if they were poor people, unquestionably.

Now, I want to make this suggestion, and request that this committee summon before it the two gentlemen who served as directors general of railroads during the war, and up to the time when the Cummins-Esch law was enacted. I want to request very emphatically, very earnestly, that as soon as possible you resume the investigation of the condition of the railroads under the Cummins-Esch law, and the management thereof, and that you invite Mr. McAdoo, and Mr. Hines here, not only to give you all information possible with reference to the operation of the railroads, but to give you specific instances where the railroad employees—that is, the official employees, purposely interfered with the operation of the railroads in order to discredit Government ownership and Government operation. I understand that Mr. Hines is now back in this country; and Mr. McAdoo, of course, is here. They can give a large amount of information.

I want to quote, inclosing, from the report of the Interstate Commerce Commission for 1911, in which they practically admit that they can not control the railroads under private operation. It is a tragic admission, but a self-evident proposition The only surprising thing is that the commission would admit it.

They say, on page 12 of this report for 1911 [reading]:

"The evils most difficult to detect and to prove to-day are those arising out of the community of interest of certain carriers and industrial corporations. The ownership of industrial corporations by carriers and of carrier corporations by industrials is frequently taken advantage of to defeat that equality between shippers which the act contemplates. This is accomplished by unreasonable divisions of joint rates, forced upon the carrier by powerful shippers who control industrial railroads. Such arrangements may be legal in form, although certainly illegal in effect. We find that a certain number of large industrial concerns control tracks and terminal facilities normally owned by small railroad corporations which do not rise to the dignity of common carriers, but which are treated as such by the connecting carriers. As a result, the connecting carriers make a switching allowance or a division of the joint rate to such terminal lines, which practice unquestionably results in discrimination and places the industrial at an advantage in the market. Another form of discrimination is found in the leasing of property by carriers to shippers for a nominal consideration with a further agreement that all shipments made by the lessee shall be routed over the lines of the lessor.

"It becomes increasingly evident that entire freedom from discrimination can be secured only by a complete separation of the business of transportation from every form of commercial or industrial enterprise."

That is the statement of the Interstate Commerce Commission in its report for 1911.

Now, of course, it is patent that you can not have entire separation—or to use their expression "complete separation"—of the business of transportation from every form of industrial enterprise as long as you have private ownership and private operation of the railroads.

I have some recent correspondence here with Chairman Clark to which I would like to refer, although I will not go into detail on it. But I submitted to him last July that it was incumbent upon the Interstate Commerce Commission to take some action, in view of the breakdown of the transportation system of the country, and in view of the fact that this investigation by the Senate Committee on Interstate Commerce had been terminated, or I might say, had been adjourned for a time. I have tried to get the chairman of that commission to make an investigation of the extent to which discrimination and rebates are going on under the Cummins-Esch law. He replied, in effect—I do not quote him literally—that it would be such a tremendous job that they could not undertake it. Of course, that is well known.

Of course, Mr. Chairman and gentlemen of the committee, while indorsing the principle of the Capper bill and the repeal of the joker therein, which is something like the so-called "American valuation plan" in the Fordney tariff bill, let me say very solemnly that that is no solution for the railroad question; that we have got to have the railroads back out of the field of wasteful and competitive speculation before we can have any prosperity for agriculture.

I recently met, this week, representatives of large farmers' organizations of the South. I was astounded over their indignation with reference to these matters. And they had expected a large delegation here and were disappointed because there were not many, and I asked them why it was. They said the farmers have not a cent to travel with. And I know that that is tragically true; it is tragically true.

And the Interstate Commerce Commission's decision to which I referred admits that these freight rates have been a big factor—not the sole factor—because financial conditions are involved in the situation.

Now, another point in the Capper bill—and may I address myself principally to that? That is, the jurisdiction of the Interstate Commerce Commission over intrastate rates. Traveling a great deal as I do, naturally I talk these matters over with the farmers; that is, with the leaders of the farmers' organizations. For instance, I spent five or six weeks on a trip to the Pacific coast during this past summer, and I talked with farmers in 17 different States. That is, I talked with the leaders of the farmers. And I am leaving again very soon for another trip to the Pacific coast. And I know, Mr. Chairman, that they feel very keenly the matter of not having any local control—I mean State control over intrastate rates. And I want you to know that I appreciate the difficulties of the situation confronting you, and that you can not have State control of the railroads and over the intrastate rates with the modified socialism of the Cummins-Esch law, which seeks to secure to the railroads a certain return upon a false capitalization. They can not do it.

The Farmers' National Council took the position, which we retain emphatically, that labor is the first fixed charge on the railroads. The railroads, whether controlled intrastate or interstate—whatever the freight rates may be—have got to pay a living wage, an American wage, to every employee of the railroads who give an honest day's work. And, frankly, the present level of wages to the railroad employees is not above a decent level.

Senator FERNALD. How does the level of railroad wages compare with the wages of farm labor? I ask you this because you are very conversant with the subject.

Mr. MARSH. I am very glad you raised that question, Senator Fernald, because it is germane to this subject. I have the figures of a national farm organization which made a study of this matter through its national bureau on that question. They start out in 1913, using as a base 100, in 1913, and compare the railroad wages, average employee compensation, union wages, in other industries, average farm wages, and combined crops and live-stock prices, farmers' gross compensation.

In 1913, as I say, they take as a base 100.

In 1916 railroad wages were up to 113. They are quoting all figures, they say, from the industrial union wages, which are wages in each year as of May, the Bureau of Railway Economics, the Department of Agriculture, and the Bureau of Labor Statistics.

In 1916 railway wages were up to 113. Other union wages were 107; average farm wages were 109; and the combined crops and live-stock prices were 119.

In 1917 the railway wages were 129; the union wages were up to 114; the average farm wages were 137; and the combined crops and live-stock prices were 185.

In 1918 the railway employee wages were up to 189; the union wages were 133; the average farm wages were 171; and the combined crops and live-stock prices were 207.

And then, assuming these figures to be correct, and I think they are approximately correct, and even if they are approximately correct they will serve the purpose for the point I make.

In 1919 the railway wages were up to 227, as compared with 100 in 1913; the union wages were 155; the average farm wages were 202; and the combined crops and live-stock prices were 213.

Now, the farmers are not getting what they are entitled to; that is perfectly true. There was a criminal conspiracy——

Senator FERNALD (interposing). The figures generally come down?

Mr. MARSH. Yes; they come down.

Senator FERNALD. What is the ratio?

Mr. MARSH. In 1921 the railway wages were up to 288, while the combined crops and live-stock prices were 122.

Senator FERNALD. One hundred and twenty-two, as against two hundred and eighty-eight?

Mr. MARSH. Yes; 122 as against 288. But, of course, it was just the reverse a little while ago. I want to read this because I want to answer your question. We farmers are not going to have an improvement in the return which we get for our products by hammering down the wages which these men earn. The farmers are going to get relief only after they get intelligent leadership in their organizations, as they had before. And I am talking very plainly, as I have been talking in publications over my own signature, when I say that they were broken and crushed by a criminal conspiracy which attempted to break farm prices as a means of breaking organized labor. This policy of deflation of the Federal Reserve Board was largely responsible for that; this stupidity—I call it largely stupidity—of the Federal Reserve Board, in starting deflation where it should have ended deflation. Some of you gentlemen come from agricultural States, and you know of the distress suffered by the farmers.

The answer to your question, Senator, is that I know the farmers are not getting what they are entitled to for their crops, and I am working in every possible way to get those prices back.

I worked for a loan to the Federal live-stock interests. And then Morgan came down and saw the President, and told the President that the bankers did not want the loans made, and then the President saw certain Senators, who have told me, that the investment bankers did not want the loans made; and then Congress did what Morgan told the President to do, and the thing broke. It is an outrage. Now, to go on down the line, we can not blame the railroads; it is coming back to the administration, and we know the reason. And we are going to fight to get the farmers what they ought to have, which is full cost of production plus a reasonable and going profit. And it is of common interest to the farmers, I will say, to see that the railway employees get good wages, because they constitute a large part of the farmers' market. And, incidentally, I may say that I am working now on a direct trading proposition which will help the farmers.

Therefore, Mr. Chairman, I do hope that pending the action which ought to come within the next two months, to restore the railroads to unified Government operation that this section will be repealed, and the power given to the State authorities to regulate the State rates.

I heard the very interesting statement of the gentleman from Oklahoma the other day as to the lack of help they have received. He did not point out in that statement, and I asked him subsequently, why they did not get court action, and get an opportunity for the State commission to have a say, because I have always understood that in Oklahoma they are very advanced, and would not let a court decision smash agriculture. He did not give me a satisfactory answer.

But it is perfectly evident that the railroad commission of a State has to have some jurisdiction over exclusive State rates. But it has no standing in court that I can see, if you have anything approximating this section.

Senator FERNALD. We are very desirous of treating this matter in a spirit of fairness, Mr. Marsh, as you know, and I am wondering about your argument. If farm labor is 122 as compared with railroad labor at 288, if we should bring the farm labor up to 288, which would bring the cost of farm products up to about double, do you not think the railroad labor would have to have an advance of about double its present wage?

Mr. MARSH. No; I don't think so. I do not say they should not have some advance.

Senator FERNALD. Of course transportation charges enter into the cost of everything

Mr. MARSH. Yes.

Senator FERNALD. It enters into the cost of farm products and of everything else; is that not natural?

Mr. MARSH. Yes; but the percentage of cost of production of the railroads is grossly exaggerated.

Senator FERNALD. It enters in?

Mr. MARSH. It enters in. But here is the point: The farmer gets to-day, roughly, only 25 to 40 per cent of the dollar which the consumer pays for the farmers' products; in some cases it is much less. It is only 25 per cent of what the consumer pays for the farmers' products. Now, the position we take is not that we will fight railroad labor, for the farmer gets more when labor gets good wages.

The thing to do is to take steps to eliminate the middleman, who gets 65 per cent, and the thing to do is to eliminate that waste.

Senator FERNALD. Mr. Chairman, Mr. Marsh has had all the time allotted to him, and I will ask only one question more: Briefly, your solution of the problem is Government control and Government ownership of the railroads; briefly, that is your solution?

Mr. MARSH. Yes; I see no other solution, but realizing what was done by the big financial interests, some of whom stayed on the inside during Government control, I repeat my request that you invite Mr. McAdoo and Mr. Hines here to give you information on that subject.

Senator FERNALD. We will have to remove a lot of railroad presidents and managers, if they are bad fellows.

Mr. MARSH. We will have to have some changes. We will have to have some changes to get them out of control. Now, not as a benediction but as a conclusion, may I read to you what Chairman Clark said——

Senator FERNALD (interposing). Would you have them managed without any financial assistance?

Mr. MARSH. No, certainly not; but I would have them managed by men who are interested in giving service and not interested in making speculative profits, because railroads are such a public necessity that they have got to be operated for service.

Senator FERNALD. You would not naturally expect financiers to turn over their capital to somebody who is only interested in service rather than in a financial return on the railroads?

Mr. MARSH. Railroad stocks should not be the subject of speculation. Let me quote you what Chairman Clark of the Interstate Commerce Commission says [reading]:

"No railroad has, in my judgment, ever been embarrassed financially if the proceeds from the sale of its stocks and bonds have been devoted to the development of the property. It is the diversion of the proceeds of these securities to other channels that leaves the railroad with a burden of debt that it can not carry."

That is the whole history of railroads in this country, as you gentlemen know. Senator Cummins is, perhaps, the best student of railroads in America.

I thank you, gentlemen, for the hearing.

The CHAIRMAN. There is one suggestion made by Mr. Marsh concerning which the chairman of the committee desires to make a statement, because it is so utterly unfounded in fact that I can not allow it to go without making a reply to it. He suggests bad faith on the part of the committee in conducting the investigation concerning the general railroad situation. That is not only unfounded as a fact, but the inference he draws from it is entirely erroneous. The chairman of the committee takes full responsibility for the program which was partially carried out during the spring and summer in regard to the order in which witnesses appeared. Upon looking at the report made by the railroads for the year ending March 1, 1921, it appeared that although the railroads had received, as operating revenue, nearly a billion dollars more than they had ever received before for the service rendered, they had expended that entire sum, or practically that entire sum, in the expenses of operation. It seemed to me, therefore, that it was incumbent upon the railroads to appear and explain why they found it necessary to expend their entire operating revenue in maintenance and operation. And they were, therefore, called upon to do that very thing. And they did appear, and their examination continued for some weeks. It is not true that only those who were defending those expenses appeared.

On the contrary, the severest critic of the expenditures of the railroads during that year appeared, and it required that association—and I am speaking of the Association of Railroad Security Holders—and that association consumed an entire week in explaining or showing why or how these expenses might have been reduced, and could be reduced in the future. Moreover, the committee, or the chairman of the committee, knowing that the representatives of the railway brotherhoods, and the railway employees had claimed that the railroads had been extravagant in their expenditures, and that they could have operated the roads for a much less sum, the chairman of the committee assigned a time for the appearance of the representatives of the railway brotherhoods. That appearance was twice postponed upon the application of the railway brotherhoods themselves, as can easily be ascertained by referring to them or their representatives in Washington.

It was in that situation early in July when the chairman of the committee had the misfortune to become ill, and was compelled to be absent from the work in Washington

for a period of something like two months. He found it impossible to secure the presence of the members of the committee, as they were busily occupied elsewhere, or any member of the committee to conduct or continue that examination during July and August. And immediately upon his return to Washington he at once took up the subject with the representatives of those who claimed that the railroads had expended much more than was necessary in the operation of their roads, and began that hearing and continued it until the public pressure for hearing upon these bills became so great that he found it necessary to suspend that hearing and take up this one.

This statement that has been put out to the country both from responsible and irresponsible sources with regard to the desire of the committee to hear the railroads in order that their case might go before the public and then suspend hearings in order that that impression might be deepened and fastened upon the country as a conviction, is absolutely false.

That is all I desire to say.

Mr. MARSH. Mr. Chairman, you have made certain charges against me, and I request the privilege of replying very briefly.

The CHAIRMAN. You may proceed.

Mr. MARSH. I say I requested to be heard time after time, and I was not granted the opportunity.

The CHAIRMAN. Certainly.

Mr. MARSH. I will say further, that I know that certain railroad organizations were ready to go on, and anxious to go on.

The CHAIRMAN. I know they were not.

Mr. MARSH. I know they were, and I will get the affidavits and present them.

The CHAIRMAN. You can get all the affidavits you like. It is immaterial to the chairman.

Mr. MARSH. I know that the railroad interests, who had smashed agriculture, were ready to smash labor, and they wanted to get their propaganda across.

I do not criticize the chairman. I knew that you were ill. But I knew also you had a Senator from Michigan to act as chairman. It was unfortunate. And I ask further, why, in view of the great importance of the subject, it was necessary to have a larger representation of the committee present than you have present this morning?

We know, as practical men, that the railroad representatives were getting ready to cut down wages. And they will never reduce freight rates until there is pressure to do so.

The CHAIRMAN. I will say nothing about that. I had nothing to do with the conduct of either the one side or the other. But the suggestion that the committee attempted to delay this hearing in order that you might not be heard, or that anybody else might not be heard, is not true.

Mr. MARSH. I know that the facts are that the committee did not hear the other side, and the country knows that and the committee will have a right to explain it.

The CHAIRMAN. You are at perfect liberty to go to the country on that.

Mr. MARSH. I will do so. I thank you for your courtesy this morning.

The CHAIRMAN. Judge Cowan, we will now hear you. Kindly state your name and your residence, and your general relation to this subject.

STATEMENT OF MR. S. H. COWAN, REPRESENTING THE AMERICAN NATIONAL LIVE-STOCK ASSOCIATION; THE NATIONAL LIVE-STOCK SHIPPERS' LEAGUE, AND THE NATIONAL WOOL GROWERS' ASSOCIATION, FORT WORTH, TEX.

Mr. COWAN. My name is S. H. Cowan; I live at Fort Worth, Tex., where I have resided for so many years that it would be embarrassing for me to tell you. I appear as the representative of the entire organized live-stock producing interests of the western part of the country, and extending somewhat farther than that; the American National Livestock Association, with its membership of many State and local organizations; the National Livestock Shippers' League, which represents shippers, including coordination of the various live-stock organizations; and, by special request, the National Wool Growers.

I am a lawyer, I think; a farmer, I guess. I am 62 years old; a Democrat; vote the Republican ticket; white.

I crave indulgence of the committee to put into the record of this hearing the results of a great deal of study, perhaps of poor quality, but active and well acquainted with the facts and circumstances surrounding the entire business from practically every viewpoint, as I believe. At least, I am willing to make that contention with any gentleman who desires to controvert it.

I have asked of the committee the privilege to be heard along with my associates. And I have had the time set at a date that suited us, but the circumstances related by the chairman of the committee prevented those hearings at the previous date. At first the Capper bill was referred to a special committee, which I say by way of information, and should I be incorrect I hope I will be corrected, of which Senator Kellogg was the chairman, and I and Mr. Benton, went to Senator Kellogg to get a hearing. I have been well acquainted with Senator Kellogg for a great many years, and we had no difficulty about an arrangement to have a hearing upon the bill. But before any of us agreed upon a date at which the hearing could be conveniently held to suit the convenience of the parties who had to work for a living in one way or another, and their time being thus occupied, it was decided, I believe, in the subcommittee—or by the general committee— to take the bill back to the general committee to await an opportunity to have a hearing under the general investigation of the full committee. To which we made no objection. In fact, it suited us better to have the bill heard before the full committee at the outset than to go before a subcommittee, and the idea of a subcommittee, I think, was only for the purpose of expediting a hearing on the bill. I think that is what I was told at the time. Mr. Benton, I think, will bear me out on that.

We have no complaint to make with regard to the matter of the opportunity to be heard. The difficulty we have had is just about as great as the difficulty the rest have had, of getting ready, the time and place at which we could conveniently get together and present what we have to present. Certainly there are many other matters pending before Congress, and which engage and engross the attention of the Senate to such an extent, in these unusual, unparalleled and unexampled times, that it would be hard at any time to get the attention of the committee, as is demonstrated by the fact that many of the members of the committee are not here this morning, gentlemen whom I feel the egotism to say will be very glad to hear what I have to say upon this subject, because I have been before committees a great many times, from days previous to the passage of the Hepburn bill down to the present, and have discussed with them individually various of these intense and difficult problems. I have been assured by these gentlemen and the chairman of this committee that I would be given all the time I wanted. I do not wish to abuse that privilege. I have, I think, never unduly encroached upon the time of this committee or any other committee, beyond presenting what seemed to be necessary.

I do wish to express this regret, however. I am not criticizing, I do not mentally or otherwise criticize any member of the committee by what I am about to say, but I do wish to express this regret: I think it was a grave mistake that the committee did not fully hear those who had given many years of study to this railroad transportation problem and the laws with respect to it, before this bill, with the scheme and plan of the bill, was placed before the Senate, at a time when the object was to get the railroads turned back to their owners—that was the prevailing object—and it did not leave the opportunity for that thorough consideration that ought to have been given to the subject.

Senator POINDEXTER. What bill are you referring to? The transportation act?

Mr. COWAN. I am referring now to the Senate bill that was reported, and the bill here, so far as section 15 (a) is concerned.

Senator FERNALD. The Esch-Cummins——

Senator POINDEXTER. That is an act.

Senator FERNALD. I suppose so.

Mr. COWAN. The committee did not hold hearings on that bill because it was deemed that the exigency of the occasion was such that the roads must be turned back to their owners as quickly as possible, as the country was demanding it. That was quite true.

The house committee which did hear the arguments on the subject refused to adopt the plan that was laid down, put out and advocated by the organization which I mentioned a while ago, the name of which I do not recollect, but one Mr. Warfield was the representative of it, and which the United States Chamber of Commerce, as a convenient vehicle which doctors use to give bad medicine, advocated and placed before the public, and at last, when the bill was introduced, it, on the front page of an issue of the Nation's Progress, took credit for that bill.

I never thought at any time that it was possible for Congress to make a rate-making rule. The Interstate Commerce Commission, as was well known, did not believe so. They yielded to the matter because there was vast influence behind it.

When I have to stand across the table to talk in the presence of men of the great ability and pleasing personality and fetching ways, if I might use a female expression of Col. Thom, I will say that I am no match for such a man, and I do not know of anybody who is, and I can only figure that he beguiled this committee into believing that this was a good thing, nurtured, coached——

Senator POINDEXTER (interposing). My recollection is that Col. Thom was opposed to that. I am not sure about that, but that is my recollection.

Mr. COWAN. Not at the last; no. With Mr. Warfield—I am speaking now of the senior Warfield—and Luther Warfield they were able to put the thing over and not have a hearing where it was exposed, and I think the subject matter ought to have been heard.

Now, I think that is the only criticism and it is certainly a friendly criticism, of this committee. I realize quite well in experiences I have had in accumulating these gray hairs and the poor amount of wisdom that I have got, if any, that the complexities of all these situations and surroundings of Members of the Senate and of the House, bring a situation about where it is next to impossible to know what to do to please the people and yet to do what is right. I forgive everybody whatever they have done, but I just want to keep them from doing it again.

I think that the greatest obstacle to human progress in the entire history that I have been able to read, and I have not read a great deal of it—and I am not going to read Mr. Wells's history of the human race, but if Henry Ford writes one I will read that, maybe—is the difficulty that we all face of admitting that we have made a mistake. If you can find a man who will admit that he made a mistake you will find a man who can start again to do a thing as well as he might have done had he not made the mistake. That is all I fear before this committee in regard to repealing this law. That is the human nature side of it. It is not a criticism of any of you as Senators or as men. It is simply calling attention to the frailties that we are all possessed of. I do not mean by that to preach, and I suppose I could not get admitted to that profession, and yet probably I could do better at that than I do at the law.

Now, with these few prefatory remarks, and having devoted a good part of a lifetime in the activity connected with this matter, and not in the pursuit of happiness, exactly, but in the pursuit of poverty, to which I and those associated with me have been led, I wish to call the committee's attention, and I hope the Senate's attention, to matters for consideration here that ought to underlie any regulation of privately-owned property doing a public service.

I do not believe that it is possible to have the Government operation of a privately-owned property successful in this or any other country. Men were not made that way. Government can not be made that way. That was the difficulty that confronted the Railroad Administration, along with a thousand others, any one of which was sufficient to have produced the results that it did.

Government ownership and the Government operation of privately owned properties are two wholly different things. The test, if it should be called a test, as frequently it is, of the Railroad Administration, is no test whatsoever of the Government ownership and operation of the railroads. The time is coming, in the process of evolution, when the Government will own and operate pretty nearly all the things where public necessity calls for it. It is like the law of self-defense. It arises and continues as long as the necessity exists, and only ceases when the necessity stops. Evolution takes no backward step except to get a better toe hold, and it is just as certain as we sit here as men that this Government of the United States is drifting inevitably to socialism; just as certain as the arts of peace lead to war. And that is what we have witnessed in this Great War. It was the arts of peace that led to it and will do it again.

I say that we are leading to the socialistic condition in the sense that the Government will own, or some sort of government will own and operate the public utilities of the country and the public necessities of the country.

Now I am not speaking here, I trust the Senators will understand, just for the purpose of being heard on some subject where you have given me the opportunity. I am just laying some predicates upon which to base what I shall have to say with respect ultimately to the repeal of this particular law and the repeal of the Labor Board law. The time has come when we can not mince words about our sound judgment, if we have got any. At least our judgment, whether it is sound or not, should be expressed. Using Gov. Stubbs's expression, the time has come to talk turkey, and that is what we have to do, because we are confronting to-day and are in the midst of a situation that itself contains no solution that if left alone will right the wrongs that are going on, and that presents to the Congress of the United States almost insurmountable obstacles to its righting them, and at least perhaps dealing largely in experimental legislation to accomplish it.

And, again, we are confronted, as always, with the proposition that 'tis not so much to pass the law as to administer it, and however good the law may be the administration of it may wreck the whole intention of those that passed the law, and that is exactly what has happened with regard to the Esch-Cummins bill.

The right of individual ownership of property, the right of persons to do business—in other words, the pursuit of happiness—that are the foundation stones of our Government, are to be affected always by what somebody else will do to interfere with those rights and opportunities. It is quite immaterial whether the power is lawful that affects your business or hurts you or hangs you. It has the same effect upon you. It would not matter whether the sheriff hung me or the Ku-Klux Klan hung me, I would be hung. The point about it is to prevent the hanging by either unless it is ustified and unless the man has his day in court and the opportunity, according to the best forms of civilization, to trial and determination of the fact.

So it is that in the establishment of the Interstate Commerce Commission the underlying principles and objects were that the individual being confronted with a situation where he must patronize the railroads or not do business, was helpless at what they saw fit to do to him, with respect to the amount that they would charge or the service which they would render, unless there could be some law that provided for his rights.

Corporations are not benevolent institutions as such. They are organized solely for the purpose of making money, and if the trustees carry on the trust reposed in them they will conduct that corporation to that object in the long run to get the most out of the business.

Blackstone was entirely right when he said "a soulless corporation." Naturally, a corporation is soulless, because Congress, the legislature, does not deal with the soul. It is a question whether it has got one itself or not.

The object was that certain principles declare, are known by the common law, and under the civil law for that matter—and I think I could trace it as far back as the Bible, but that might be embarrassing to some gentlemen who would have to admit that they knew it when they did not—that the right to a reasonable charge for doing a public carrying service has always existed, the right has always existed, and the object of all the law on the subject of the regulation by the Government or municipalities has been for the purpose of assuring that right.

Our Constitution provided, under the fifth amendment, for the protection of the rights of property and of individuals in the completest fashion possible. There were no corporations for them to act upon or to have reference to at the time, practically, I believe. But so adjustable is it that it has been made to fit the public service corporations of the country, and to-day the whole library of the law upon the subject of constitutional rights of property is involved in those rights as between the States, or some government, or individual or corporation asserting the right under the Constitution to not have its property taken for public use without just compensation.

Of course, the very object of establishing a corporation and putting the property into that business was that it should be devoted to public use, but the construction which is now admitted law, and there is no question about that—perhaps it is entirely right—is that it can not be taken for public use without just compensation. In other words, it can not be confiscated. They devoted it to public use when they went into the business. And there was on their part the obligation, in going into business, to afford reasonable rates to those whom they served, and that is just as much a fundamental obligation as the other.

The difficulty confronting us to-day is that they shall have a certain percentage of return upon some value of property without regard to whether or not those whom they were constructed to serve shall receive that service at a reasonable cost according to their business, their opportunity to live and to prosper and to do business in the country, and that is the controversy to-day existing between the railroads and the legislative department of the Government and administrative department of this Government and of the States. That must either be settled so as to leave the people an opportunity to live and reasonably prosper under the rates, or the Government will be compelled to take the railroads, just in the exercise of the law of self-defense and it can not be avoided.

I say that when Congress undertook to establish a rate-making rule by fixing a certain percentage, or placing it in the hands of the Interstate Commerce Commission to do it, it overstepped the bounds of proper legislation. Congress could have fixed the rate itself—that is true—but then it would have had the responsibility; it would have rested somewhere. But they fixed a percentage. In other words, when the Government ceased to give the standard return, Warfield & Warfield said: "Let us take it from Jones's pocket." The only mistake they made was that Jones's pocket was not deep enough. That is the only mistake. Because they made the rates so high, through what they led the Interstate Commerce Commission to believe was the command of Congress, that the traffic would not move, and so Jones's pocket fell out at the bottom, or the bottom was reached too soon, and they found they could not make it; and now who among the gentlemen are advocating an advance in rates for reaching the 5½ per cent plus the one-half per cent? Instead of that they are

asking for a reduction in rates, because Jones's pocket has to be filled again before anything can be taken out.

It is the duty of Congress to protect the helpless people of the country. If Congress and God do not protect the helpless, who will do it? The other fellows will take care of themselves, and since the day when that old blind man, Isaac, was deceived and fooled by his son Jacob and his own wife into bestowing the blessing intended for Esau upon Jacob, and all of his things and the products of the earth were committed to him and his descendants, they have been taking care of themselves, and they will continue to do it.

It is the common people that need the protection, and they must have it in reasonable rates; and then the question is, Who is going to determine that? You have got to leave it somewhere, in sound judgment of men, according to the circumstances at the time of the transaction, as being the nearest to an approximation of justice that is possible, and repeal all arbitrary provisions that prevent the exercise of that sound judgment.

There would be no excuse for the organization of the Interstate Commerce Commission or a State commission were it not that it is confessed in the very fact of establishing them that the legislative body itself is incapable of doing the thing. And we all know that is true, because Congress could not sit in judgment and determine—it would be perfectly impossible—what reasonable rate Jones ought to pay for the hauling of his hay or his pigs or his coal, or what reasonable rate anybody else ought to pay. The circumstances are very complex always, so that it takes the use of somebody's judgment to determine

Now, before we had commissions the railroad exercised its judgment, or whatever character of carrier it was—the hackman, for example, or the man who drove the oxcart or rolled the wheelbarrow—and they always took what the traffic would best bear in the long run to the man that was performing the service or the corporation that was performing the service—that is, they always took what it would bear and what the traffic could continue to bear.

But competition, the Supreme Court was led to say in more than one case, will always lead to reasonable rates. They did not know what was coming. They were not prophesying, they were speaking of the past. Competition between the institutions organized for the purpose of making money out of the business brought it down, naturally, to the point where we would have more reasonable rates, and even at times to points where in the effort to crush one another out of business, or to secure more traffic, the rates were made less than would pay a profit at all. But when they combine with one another and eliminate the competition, whatever the means of combination may be, and fix their own terms for the carriage, then it is the duty of the Government, and recognized all the way through, to provide the means whereby the individual will be protected against such combination, and so we come back to the decisions of the Supreme Court of the United States a good many years ago.

Take the celebrated Lockwood case, in which they held that even the contracts made by the railroads must be reasonable and just, and placed it upon the sole ground that the individual must patronize the public utilities, and they were charged, therefore, with the duty of making contracts that would be reasonable, and they could not limit their liability unless it was a reasonable limitation.

Now, the object in establishing the Interstate Commerce Commission and State commissions was to secure competent men, selected for their qualifications, to inform themselves and keep themselves informed, to exercise sound and unbiased judgment based upon the facts ascertainable by them, to determine how much ought to be paid for transportation.

Looking at it from the interest, that is to say from the rightful interest of both the railroads and the shippers, I say that anything that interferes with the exercise of that sound judgment at once destroys the very purpose and object of regulation, and it can not exist with limitations upon that judgment by arbitrary rules. I think it was a grave mistake.

Now if we come to what has actually happened, it has been proven to be a mistake, but what appeared in the vision of the committee, what appeared as a possibility to the committee in the passage of the law may have justified the committee in reporting such a bill. For example, I believe it was conceived that the country ought to organize itself into a number of large competitive railroad systems where the strong would take care of the weak, and that is the great argument for Government ownership, that the whole may take care of the weak lines, and yet furnish ample service and transportation facilities for the entire public, and that is one of the main objects of this law, and it is so recited in it.

But that was reckoning without the host, because it could not be accomplished. We even have yet in the public press professors who are trying to educate the people

in these matters. And I will tell you, we have got to get somewhat away from professors in order to get back to the practical things. They do not grow corn and they do not raise cattle and they do not come into the bankruptcy court and they do not have the trials and tribulations that go with producing the primary wealth of this country. They are good for the purpose of educating the people, that is all right, but when it comes to telling the business people how to run the business of the country it is all wrong. But they tell of putting it all into 18 systems, and they tell how they can be made up. It is a great joke There is no possibility to it.

The Government can not compel it for the reason that it would have to first own the properties in order to consolidate them. Then it would have to destroy the rights of the States under the constitution and the corporations that have been organized thereunder, to accomplish that. Then you must have the incentive of somebody that wants another piece of property. I would like to see somebody that wants the Orient Railroad. I see a number of railroad people present, and I ask them: Does any one want it? There is the Missouri & Arkansas; that seems to have gone back. Now it would be bad business—and they are not guilty of that generally—to take a property that would not be profitable to them. And the fellow that has got the other line wants to sell it at something that he can get for it. Of course, he has got the privilege here of junking. I think that was a mistake. It could have been junked anyway sufficiently to protect the interest, as Mr. Benton has well explained.

The whole problem is that whatever objective the committee had in passing this law, it has not happened that it has worked out that way, but it has paralyzed business, it has destroyed individuals, it has destroyed communities, it has destroyed railroads, at least it has been one of the factors in doing so.

The Labor Board is perfectly inconsistent with the private ownership of railroad property and its operation by the owners. If we allow that a railroad company shall own its property and operate it under the obligations to give good service at reasonable rates, we must allow that corporation to have the right to employ the means of carrying out that service. If we are going into the business of determining wages for railroads let us go into the business of determining the wages for the entire United States. But assuming, if we may, that in order to avoid strikes, in order to avoid the disruption of business temporarily from that cause and maybe working great destruction, it was justifiable to provide for that under the threats of strikes and the like, still when you give to one arm of the Government sitting in Chicago the power to fix the amount of expenses that the private owner of the railroad has got to pay, and at the other end of the Government, at the Capitol, you offer to the shipper the opportunity to have a tribunal to determine and fix a reasonable rate, you destroy completely the entire fabric of regulation, and it can not be done, it can not be accomplished. We must realize ourselves, through our limitations upon power, what Congress can and can not work out. The limitation arose here because the traffic did not exist, when you put the rates so high, in sufficient quantities of the sort that would enable the railroads to earn the money to pay the wages that the Labor Board fixed on the rates that the Interstate Commerce Commission fixed that bankrupted the entire agricultural and live stock industry of the country, coupled with the fact that in a year and a half the existing property values in the country were cut off 60 per cent, bringing to actual want for the necessities of life the great part of the population of this country that is necessary to make the country safe and great.

It is hard here in Washington to realize what the situation is out in the country. They say they realize it. They say they know the facts. They say they admit the facts. You tell them the situation; they say, "Yes; we know that." But it is not realized. The realization is not there. The man that knew he was worth one hundred or two hundred thousand dollars—and there are literally thousands of these men of whom I am speaking now—two years ago, a year and a half ago, to-day can not get the credit for his family at the store to support them, and he scrapes up a carload of mixed cattle or hogs or whatever he can ship, and ships to the market to get the money to buy his groceries with. Now, you sit here and you may not believe that. I say, as I said to the agricultural commission: It ought not to satisfy itself without going into the households and seeing this great farming element of this country that is brought to bankruptcy and ruin by whatever has happened. And there are a multitude of things that have happened, and whatever causes it, it is true.

Yet we must realize the fact that we are getting to-day somewhere near the prewar level of prices of farm products covering a period of 25 years next before the war, taking the average.

The wage earner on my farms can not earn a dollar a day. Now, I own these farms like some of these railroads own their property—for what I can get out of them. I can not levy any taxes; they can. Now, this wage earner can not earn a dollar a day; there is nothing he can work at to earn a dollar a day and his board. But the section

men on the Santa Fe, the Mexicans and others working along there for eight hours a day, and soldiering at that, I guess get $3.25, isn't it, Mr. Coleman?

Mr. COLEMAN. No; they get 35 cents an hour.

Mr. COWAN. Well, they work eight hours. And this country, gentlemen of the committee, can not pay that, and the railroads can not pay it and make reasonable rates. And when the Labor Board undertakes to enforce it it is wrecking and ruining the country; that is my judgment. I want to talk plainly to this committee, and I believe that those who comprise and compose the live stock organizations which I represent will rise up as a man, within 1 per cent, and back everything I say upon it. I am speaking from the facts that I know as I know them and from talks with the people and seeing them, and I know what I am talking about. Now, that situation is the one that is up to Congress to relieve.

Now, the railroads are not blameless. I hold no brief for them. I don't believe they have ever charged me with holding a brief for them. And when they held the hearing in Ex parte 74, and the chairman of the railway executives was asked a question by one of the members of the Interstate Commerce Commission as to what the position of the railway executives was with regard to the application of railroad labor for an increase in wages, then being heard by the Labor Board at Chicago, he sat for a few seconds and then he answered, "We are neutral." They were neutral then, but they are not neutral now. They were neutral then because Jones's pocket had not been touched to the bottom. These are facts that ought to be known, and Congress ought to act in view of and in pursuance of such facts.

Now then, they put over a proposition in Ex parte 74 in regard to valuations. That is the greatest crime that has ever been committed in public against the United States, aside from taking life. Shortly I will review the decision in Ex parte 74.

Now I wish to call the committee's attention to a brief that was prepared by myself and Clifford Thorne, Grady Cary, and S. C. Rowe. It was filed in Ex parte 74, in which we undertook to analyze correctly this act that you passed. The act was bad enough, but if it had been properly analyzed and sifted out on the fundamental principles of the law of the regulation of common carriers a great deal of this trouble could have been avoided. There are not enough members of the committee, I believe, present so that I should presume upon the committee to read this from brief, but I will ask permission to put this brief into the record and ask the committee to have it printed.

The conclusion that we reached is the one that the commissioners finally found themselves bound to come to in the last few days, that the soul of the whole act was reasonableness, and that when the second paragraph of section 15 (a) said that the Interstate Commerce Commission in the exercise of the power to make reasonabe rates should modify, adjust, initiate and so on, that it meant what it said, and that reasonable rates were the first sine qua non—is that the right word to use there, Mr. Coleman? At all events, it was a condition precedent to the exercise of that power at all that it should in the exercise of the power make reasonable rates. That the commission ignored, never even mentioned in its opinion or remotely referred to at any time until they came to this grain case.

I will put this brief in the record, and ask to have it printed.

The CHAIRMAN. It will be incorporated.

(The brief presented by Mr. Cowan is not printed in full in the record, but a copy is on file with the committee.)

Mr. COWAN. Now, we have pointed it out so plainly that there can be no mistake about it.

Furthermore, another condition precedent was that the commission was not to attempt to exercise that power except as to railroads economically, efficiently, and honestly managed, and that was completely ignored. It was admitted that they were not economically managed They fixed the 5½ per cent in that valuation in face of the fact that it was admitted that they were not economically managed, and could not then be economically managed for want of 3,000 passenger cars, 2,000 locomotives and 100,000 freight cars, and that is recited by the commission in its opinion.

Mr. BENTON. They fixed 6 per cent, didn't they, Judge Cowan?

Mr. COWAN. Six per cent?

Mr. BENTON. You said 5½ per cent. It was 6 per cent, wasn't it?

Mr. COWAN. Yes; it was 6 per cent. Yes. I want to refer to that while I am here, to punctuate the fact. It was suggested the other day in the House committee, when Mr. Benton was asking for a hearing on this subject, by one of the committee, and it has been said to me by one or two of the members of this committee: "Why, this act will expire, this section 15(a), this 5½ per cent rule, will expire the 1st of March, and we could not pass any law before that, could we?" And some gentlemen do not know, and I ask them to read the law, and Mr. Benton has called attention to that,

and it has been amazing to us that this idea has gone around a good deal here in the Capitol, that this percentage guaranty clause of this law will expire on the 1st of March.

The provision was that the Interstate Commerce Commission should fix a percentage which would be a fair return upon the fair value of the property. That was the provision. Of course that is constitutional as construed by the Supreme Court. If the Interstate Commerce Commission could do that, that is always the proper thing to do. And that per cent was to be the same in each of the groups or territories if it was divided into more than one. But during the two years it was to be 5½ per cent, to which the Interstate Commerce Commission might add one-half of 1 per cent to make improvements and betterments chargeable to capital account. Which the Interstate Commerce Commission proceeded to do, and made it 6 per cent, and the man that could say that the Interstate Commerce Commission would not now make it 6 per cent is going exactly in the face of the actual facts as they did exist actually, and what they did do when they did make it 6 per cent. The man that would say that would be going in the face of the actual facts.

Now, it said in the opinion that the roads would be expected to report every six months of this collection. And I went to the statistician and to the bookkeeper and I asked them about it, and they did not know. They did not know it was in the opinion. And there has never been a report about it, and there has never been a word said about it, and the Interstate Commerce Commission has done absolutely nothing, so far as I can find out from these gentlemen, with respect to that one-half of 1 per cent. Nothing has been done by the Interstate Commerce Commission about it so far as I can find out. So it is a part of the return, 6 per cent, and that is the standard they fixed, and the Supreme Court has said so in the Gas case. That is the standard they fixed.

Now, I am not complaining of that; but I am complaining that they fixed the value twice too high for rate-making purposes, and that was the blow that killed father.

The CHAIRMAN. We will have to suspend now.

Mr. COWAN. I thank the committee for permitting me to complete what I wanted to say about that this morning.

The CHAIRMAN. We will take a recess until half-past 9 to-morrow morning, when Judge Cowan will resume.

(Whereupon, at 11 o'clock a. m., an adjournment was taken until Friday, November 4, 1921, at 9.30 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

WEDNESDAY, NOVEMBER 9, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9 o'clock a. m. in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will come to order. As much as I regret it, Judge Cowan, that we have not a larger attendance of members of the committee, I think we had better proceed. You may resume your statement, if you will.

STATEMENT OF MR. S. H. COWAN—Resumed.

Mr. COWAN. Mr. Chairman and Senators of the committee, following my statement before the committee last Wednesday, the second instant, at the conclusion of which I presented, in part, a brief analyzing this act in part, to show that the Interstate Commerce Commission should have exercised its power to make reasonable rates, rather than to subvert every other consideration to the sole purpose of producing revenue equal to 6 per cent of the aggregate value of all roads in a group, I now desire to review the main features of that decision. The purpose of this is to show that the rights of the shippers and the public were destroyed; the rights of the States abrogated; the stock raisers, whom I represent, and agriculture, were unduly burdened, and the railroads themselves were wrecked and business everywhere was paralyzed.

The object is not for the purpose of criticizing the Interstate Commerce Commission, but to point out the reasons why, in presence and in view of that deliberate decision, it seems necessary to repeal the act, or that part of it which brought about this calamity.

From conversations with individual members of the Interstate Commerce Commission, and from breathing the atmosphere that surrounds the commission's offices, comprised of a great number of men in positions of examiners who are largely the spokesmen and thinkers for the commission in handling the matters referred to them, I gather that it is the feeling of many of the examiners—probably it might be said to be the feeling of the commission—that they are blamed for the result of trying to do what Congress commanded tham to do—provide money and revenue for the railroads.

This idea, in my opinion, was not justified by the construction which can easily be placed upon the act, though it was justified by the construction which they did place upon it.

Since the purposes of producing revenue by the method provided for have wholly failed, and since it had been demonstrated that it is impossible to carry out that plan and scheme to achieve the results which this committee and Congress aimed at, there would seem to be no reason why, if the act is harmful, it should not be repealed. That is not a criticism upon this committee, upon those who prepared and put forward the bill. It is simply a statement of fact as a reflex of what has happened unexpectedly, I have no doubt, to most of the members of this committee and to Congress, though it was not unexpected to those of us who have given a great deal of study to the subject as will be reflected in the arguments which we produced before the House committee when the same bill was there for consideration.

Senator WATSON. Having just come in, will you let me inquire, Mr. Chairman, what particular phase of the bill is being referred to?

Mr. COWAN. Section 15a.

The CHAIRMAN. We are discussing section 15a, and an amendment to section 13 of the interstate commerce act. These changes asked for in the bills before us are the main features that we are now discussing.

Mr. COWAN. Yes; those are the main features under discussion.

The CHAIRMAN. And Judge Cowan is now referring to the plan adopted, set forth in section 15a.

Mr. COWAN. And as construed by the Interstate Commerce Commission.

The CHAIRMAN. Yes.

Mr. COWAN. I have prepared what I have to say, or, rather, I have made my study of the subject upon section 15a, more than on section 13, because that is the fundamental fault and defect in the law; it is the fundamental cause of the taking of jurisdiction of the States by the Interstate Commerce Commission. I think unwisely, I think wholly contrary to the entire spirit of our form of government, and I think contrary to a fair construction of the act itself. Indeed, I think contrary to the exact and positive language of the act.

Now, what I say on that subject is with that becoming respect, I hope, that every lawyer ought to have for a court before whom he practices, and for the Interstate Commerce Commission. And it does not mean—and I trust no one will give it that construction—that I hold or think that the Interstate Commerce Commission has acted otherwise than in the light of the best reasoning that the commission drew to itself in the consideration of this act.

I think it is not unbecoming to say, and I do say, that the enormous power arising naturally out of the great influence of the large owners of capital, the large owners of our big institutions of this country, on which the country and its business depends, had not a corrupt but an unwonted influence compared to the ordinary citizen, where we had practically no show even to present to the Interstate Commerce Commission for its sound reasoning upon what we might gather, the facts as they ought to have been presented. I think it due to say that as a result of my study of this subject that it is a disastrous situation that of the people who make and produce the primary wealth of this country, they have no means of speaking for themselves and asserting their rights, except what they may have through their representatives in Congress, and except by the individual officials and others of this country who serve the public.

I think the Interstate Commerce Commission was intended as a buffer between these interests and the people, to protect the people. I do not think that it has taken that position and exercised it in the way that the underlying principles of the law intended, nor as good government would require.

There is maintained here the Bureau of Railway Economics at very large expense, which is an operating expense that is charged up against the persons who pay for service upon the railroads, the same as any other operating expense. It was an institution which the Government supported during the war and during the entire time of Federal control of the railroads.

Senator WATSON. What is that annual expense?

Mr. COWAN. Well, I do not know; I have no information. It is large. But whatever it may be, it furnishes the only means of information available to determine, by statistics, the results of railway operation by systems of railroads, and it is to that source alone that the Interstate Commerce Commission had access during the hearings in Ex parte 74. And that institution, representing all the railroads, made up and furnished all the data and information, by the employment of a large number of great and small experts and clerks and others, to which the individual corporation or others who might desire, had no access or means of analyzing, notwithstanding it was maintained really at Government expense.

The accounting department of the Interstate Commerce Commission is splendid so far as it goes, but when you take this act and undertake to enforce it and give application to it, this committee, in the preparation of the bill and Congress in passing it, did the sensible thing to provide that these railroads which were operated, whether a long time or not, operate as a system, and should be so treated—that is to say, that they should be so treated in law as they are in actual fact. So that to-day, if you want information, you can get a great deal better information from the Financial Chronicle in New York than you can out of the reports of statistics of the Interstate Commerce Commission, and you can get it during this life time.

It is a serious matter, I wish to say to you, Senators, and I trust you will bear it in mind, that if you, to-day, were representing the grain growers, or the cotton growers, the live stock producers, or the lumbermen, or the coal men—anyone of you, as attorneys, and you undertook to make up a set of statistical figures to demonstrate the results of certain operating railroad systems, you would find very great difficulty in doing it.

Senator WATSON. Well, is that a lack of system on the part of the Interstate Commerce Commission or a lack of appropriations?

Mr. COWAN. I do not yow, Senator. But I do believe that they ought to be required—or that thay ought to—I do not think the law need require them—because there is ample power in the law, but they ought to have their statistics made in a manner so as to make them usable for practical purposes. And that is not the case.

Now, to give you an illustration and make it so plain that it can not be misunderstood——

Senator LA FOLLETTE (interposing). I think it is fair to say that the Interstate Commerce Commission has to struggle with the Committees on Appropriations of Congress to secure appropriations large enough to provide for the work that they are required to do.

Mr. COWAN. That was the case, Senator, when I last knew anything about it, but I was not able to answer the Senator's question other than I did.

Senator LA FOLLETTE. It has been the case since I have been in public life, and since the Interstate Commerce Commission was first created. And again and again has the Interstate Commerce Commission, or members of it, appealed to me to go personally to members of the Committees on Appropriations in order to urge upon them larger appropriations for the work that the Congress imposes upon the commission and which the public expects it to do. And it is a struggle all the while.

Senator WATSON. Then it is a lack of appropriations.

Senator LA FOLLETTE. It may be that there ought to be some additional legislation, but I think not; I think that they have reasonable power.

Mr. COWAN. No; I did not mention it for the purpose of advocating additional legislation upon the subject.

Senator LA FOLLETTE. No; I understand.

Mr. COWAN. I mentioned it for the purpose of demonstrating the difficulty that confronts the ordinary people who pay the freight in trying these cases, and in having matters considered as I think they ought to be considered. And I am not doing that for purposes of criticizing the Interstate Commerce Commission. I am referring to a matter of fact. That whatever be the cause, it is a very unfortunate one, and will lead to just such conditions as have happened in the rendition of the opinion in Ex parte 74, which presently I shall review.

The single illustration that I want to refer to is this: The question was, What amount of advance in rates shall be made for the purpose of producing the revenue which the commission may decide it is necessary to produce under this act?

We wanted to know what the volume of traffic was on particular lines of railroads in particular territory, and especially in this territory of the great grain and live stock growing portion of the country, where I was interested in the representation of those that I have been employed by for a number of years. I, therefore, prepared certain requests for data which could have been furnished by the Board of Railway Economics. The Interstate Commerce Commission did not have any such statistics. That was during the hearings. It was held over for a week, and I kept inquiring whether we were going to have that information furnished. I need not here stop to argue whether it was valuable information or not, but the purpose was certainly an important one, and that was our purpose, and Mr. Thorne and myself and others who had had at least some experience in the matter had prepared these requests. And on the last inquiry, when the matter was shut off as to whether this data had been prepared, it having been first stated that it would take some time and the railroads kept saying that it would take so many men from their offices, and all of that, which always happens when you ask for statistics of the Interstate Commerce Commission, the chairman of the Interstate Commerce Commission said, "Well, we will decide now that the commission will not request it." So it was not requested, and it was stated that we did not need it. Well, I could demonstrate that we did need it and needed it very badly, and need it yet.

In the hearing of Ex parte 74 there was no means provided—I mean money—and none obtainable whereby the live stock and farm producers, and producers of fruits and vegetables—the things that grow out of the ground, on which the people live—to get that amount of data that was necessary for me to present an argument comparable at all to the vast volume of statistics that had been prepared by the most skillful men—without intention of paying undue compliments, I will say—under the supervision of Col. Thom, who sits before me now, and Mr. Wettling, a very great statistician. We could not produce anything that was comparable. We did not have the means of getting it, if we had the money, and we did not have the money, and it was pitiable to see the few men, who were scarcely able to pay their expenses, who appeared before the Interstate Commerce Commission in representation of the class of people to whom I have referred. The Interstate Commerce Commission was confronted, apparently, with demands for a very large increase in rates, apparently from the shippers of the country, but it was not so much from the shippers of the country as from the trade; organizations of the shippers who sell f. o. b., to whom it is immaterial what the freight rate is, provided their business is not, in volume, reduced thereby, were in enormous majority. It was comparable to the Democratic majority in Texas, before that commission—a hearing room literally filled with very important, honorable, and intelligent railroad men and representatives of large interests—steel, coal, and lum-

ber—and certain industrial traffic representatives of associations of merchants and others at large cities, with commanding influence, to impress the commission with the idea that the largest possible increase must be made in rates, and whatever means might be devised to secure that, were only the best means to the best end.

I have no doubt the Interstate Commerce Commission acted under that belief and thought. It hardly could have been otherwise. For example, the secretary, I believe was, of the National Industrial Traffic League, said that what he was afraid of was that the railroads had not asked enough.

I think Col. Thom thought that was a mistake, because he knew he had asked for enough.

Mr. Nimrod, or Nemo, or some such name—I do not recall now—was the other representative of the National Industrial Traffic League, who, I understand, operates a big steel mill out near Chicago. Whether it is true or not, I do not know, but it was said he had a railroad over to the main lines from which he got good divisions from the point where he manufactured his product out to the railroads to whom he sold his supplies; and he backed up this proposition also, and testified at length.

The Merchants Association of St. Louis came along with a telegram and said that the rates must be increased. "What we want is service."

Now, that term, "What we want is service," was spread throughout the country, and it was the most successful propaganda I have ever known to be circulated throughout the United States, to induce the commission to make an advance in the rates, and to make the rates high, and to bring forward the demand upon the Interstate Commerce Commission literally by hundreds and hundreds of letters and telegrams from everywhere.

I think the Interstate Commerce Commission now feels that it has been greatly imposed upon, and certainly that it is being unjustly criticized for doing what apparently the whole people of the United States were demanding. I have heard just such statements made, and I quite concur with the commission that they are justified in that belief.

And now it is said that even the railroads want the rates reduced. That has been stated to me by some of the commissioners, and by some of the general attorneys, and some of the strong men of the country. And it is an apparent necessity to the railroads. It is a real necessity to the people. If the commission adheres to the decision it has rendered heretofore, in Ex parte 74, it is without power to do it. If it is compelled to do that which it assumed in Ex parte 74, it must do it by command of Congress. It can not reduce the rates, because its power to do so depends upon holding that the rates are unreasonable, and in that case, as I will show in reviewing it, the commission fixed the rates for the revenue and declared that that was reasonable. Like the three tailors on Tooley Street petitioning Parliament. "We, the people of England, petition Parliament" to do so and so, and the second paragraph of the resolution "*Resolved*, That we are the people."

Now, that has worked a great calamity, and it is our object here to secure a repeal of this section 15a and restore the rate-making power of the tribunal appointed by Congress to do it, to the exercise of that sound judgment which alone can work a benefit to the people and to the railroads in the ultimate end.

I would not have prepared a review of Ex parte 74, except for the fact that so many people are not acquainted with it, or are not acquainted with the law or the theory of the Interstate Commerce Commission, to dispute the propositions which the logic of the situation unerringly establishes.

If I may be permitted now, I will read what I have on that subject, without stopping to comment upon it.

In the first place, the theory of the act is wrong for reasons we elsewhere give, and in the second place, the conclusions of the commission construing it are wrong.

At page 244 the commission states:

"Section 15a of the interstate commerce act provides that in exercising our powers under that section we shall 'initiate, modify, establish, or adjust' rates for the carriers as a whole, 'or as a whole in each rate groups or territories as the commission may from time to time designate.'"

What the act does say is:

"In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

Thus at the outset section 1, which was reenacted by this act, which prohibits every unjust and unreasonable rate and declares them unlawful, and section 15, which empowers the commission to prescribe reasonable rates, were made subservient to the sole purpose of securing aggregate revenue.

Section 1 provides—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 15 provides—

"That after full hearing if the commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected is or will be unjust or unreasonable, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable rate," etc.

The rates referred to are those which the individual and those similarly situated pay, and the right of the shipper is coextensive with the duty of the carrier to publish just and reasonable rates as required by section 1.

It is also in the exercise of the power to require this, and to make just and reasonable rates that the commission can exercise the powers in section 15a to so adjust the rates as to produce the revenue as "near as may be."

So at the threshold of administering this law, the mistake was made to produce the revenue and then to declare that rates so made were reasonable. This construction upset the whole fabric of this act to regulate commerce in its fundamental design to protect the shipper against unreasonable rates. The first condition of section 15a, paragraph 2, was annulled.

What I wish principally to speak of is the western district, divided into two groups, namely, the western group and the mountain-Pacific group.

Western group: The territory lying west of the western boundaries of the eastern and southern groups; south of Lake Superior and of the international boundary line, north of the Gulf of Mexico and the Rio Grande, and on the east of a north-and-south line running as follows: Following the boundary line between the State of North Dakota and the State of Montana and the boundary line between the States of South Dakota and Wyoming and Nebraska and Wyoming, to the line of the Union Pacific extending east from Cheyenne, Wyo.; then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo, and Trinidad, Colo.; then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, N. Mex., to Albuquerque, N. Mex.; then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Tex.

Mountain-Pacific group: All that territory lying between the line last above described and the Pacific coast, not including Alaska.

The CHAIRMAN. Judge Cowan, in using the word "reasonable" I suppose it may be assumed that the rate must be reasonable both to the freight payer and to the carrier?

Mr. COWAN. Absolutely. I used it while you were out, I believe, in quoting from section 1.

The CHAIRMAN. Under section 1 it must be reasonable both for the carrier and for the freight payer.

Mr. COWAN. Undoubtedly. It could not be otherwise; never could be otherwise.

The CHAIRMAN. Now, it is true, is it not, that whatever may be the reasoning of Ex parte 74, that the Interstate Commerce Commission in a recent case, the grain case, held that the rate must be reasonable; that that was the dominating criterion?

Mr. COWAN. That is correct.

The CHAIRMAN. It must be reasonable both for the carrier and for the shipper?

Mr. COWAN. Yes, sir.

The CHAIRMAN. So far as section 15a is concerned, it did not repeal that command to the Interstate Commerce Commission, to make rates that were reasonable both to the shipper and to the carrier.

Mr. COWAN. Yes. While you were out, Mr. Chairman, I asked whether I should go ahead, and was told I should, and I pointed that out.

The CHAIRMAN. That is what the Interstate Commerce Commission did in Ex parte 74.

Mr. COWAN. Yes, sir.

The CHAIRMAN. But it seems to have recalled that decision, to that extent at least, in a recent case.

Mr. COWAN. Yes. Paul at one time in his history believed that he was serving the Lord in persecuting the Christians, but the scales fell off his eyes. But the troubles that have come upon our country came because of the decision in Ex parte 74, and I am complaining of Ex parte 74.

Senator WATSON. It is a long time since I read that. Does the Interstate Commerce Commission hold there that they could make rates that were not reasonable to both sides?

Mr. COWAN. No; they declared that if they made rates which produced the revenue, it was reasonable.

Senator LA FOLLETTE. They fixed a rate to produce the revenue.

Mr. COWAN. Yes; they fixed a rate to produce the revenue.

Senator LA FOLLETTE. And then put the seal of reasonableness upon it after they fixed the rate.

Mr. COWAN. That is it exactly.

Now, they have not, in the grain case, taken back the ruling in Ex parte 74. The grain case did acknowledge the principle you have announced, Mr. Chairman, but it did not overrule Ex parte 74. It still stands there.

Senator WATSON. Now, to get your viewpoint, do you hold that if the Interstate Commerce Commission had fixed a rate that does not produce sufficient revenues, that that is a reasonable rate?

Mr. COWAN. I can not answer that question in that form, Senator, lest I might be misunderstood. I hold that the only way to determine what a reasonable rate is, within the meaning of the regulating law which authorizes a commission to prescribe the same, is by the exercise of a sound judgment of those called upon to act, without an arbitrary rule as to how much it shall produce by way of profit, or how much it shall contribute to the aggregate revenue of a company, or any number of carriers.

Senator WATSON. No. But in determining the reasonableness or unreasonableness of any rate, is it or is it not necessary to take into consideration whether or not that rate would produce sufficient revenue to run the railroads?

Mr. COWAN. It is not necessary, nor is it possible. Your question elicits this reference: That there are two relationships with respect to what constitutes reasonable rates. One is that relationship which arises when the Government, be it State or Nation, by reason of the body of rates which it fixes, is charged with having deprived the carrier of its property without due process of law or just compensation. And the question then arises between the States and the railroad company, or a lot of railroad companies, as to whether that has been the result of a body of rates so fixed. In that case the question to determine is not the reasonableness of a particular rate, nor the reasonableness of the aggregate of the rates. The question is whether the railroads have been deprived of their property within the meaning of the Fourteenth Amendment, for public use, or whether it has been taken for public use without just compensation.

Now, when you come between the individual and the carrier that he pays to perform service for him, it is entirely immaterial, and the rate can not be determined upon the question as to whether or not it is sufficient to pay a certain proportion of the aggregate return to which that road, or all the roads, might be entitled. Those things have been decided by the Supreme Court and by the commission. In one of the Minnesota cases, when the question as to the coal rates went to the Supreme Court of the United States, the contention was made that if all rates produced only the amount of revenue that the coal rates did, it would bankrupt the railroads, and the court held that it could not be tested by any such rule as that. It may be that the railroad would be required to make a particular rate which would not more than pay the expenses of that transportation. And the railroads do that themselves, and have always done so, whereas others pay a great deal more, and yet each might be reasonable; that depends upon the circumstances, and those are the things by which the commission is to judge

Senator WATSON. Judge, let me ask you this broad question.

Mr. COWAN. Yes.

Senator WATSON. I am interested in your viewpoint. What is a reasonable rate, in your estimation?

Mr. COWAN. It has never been defined, as the Supreme Court said in the very first case decided—the Texas-Pacific case.

Senator WATSON. I am aware of that.

Mr. COWAN. They referred to some of the courts of the Nation, and the railway and canal traffic act of England.

And from that day to this the Supreme Court of the United States, and the supreme courts of every State that I know of, have said that the law does not define what is a reasonable rate, and it can not be defined.

Senator WATSON. I am aware of that, but I am asking you your individual opinion.

Mr. COWAN. The reasonable rate in the present situation of this country is the highest rate that the traffic will bear and which will freely move to the markets of usual consumption of products, compared to the traffic during a period of time for 10 or 15 years next before the outbreak of the European war.

Senator WATSON. The highest rate the traffic will bear and move the products?

Mr. COWAN. Freely.

Senator WATSON. Is any reference to be made then, in determining that question, as to whether or not that highest rate will produce sufficient revenue to allow the railroads to operate?

Mr. COWAN. No, sir; you can not; because if the railroads can not operate, they can not get the money, and if the people will not move the traffic they can not get the money. The present situation is such that they can not get enough and have a rate that will move the traffic. I am giving you now my view of what will be reasonable rates. There is no law to that effect.

Senator WATSON. No.

The CHAIRMAN. Much is to be said in favor of that, but that means that the rate must be one that in a course of years is reasonable. I do not think the rate can be tested by one month, or by one year.

Mr. COWAN. No; I said in the course of 10 or 15 years.

The CHAIRMAN. But it means a rate which will return over this series of years and months a reasonable rate of reward to the carrier for performing the service. It means a rate that will move the traffic, and that will earn a reasonable reward or profit to the carrier for performing the service. You would not contend, would you, that simply because the farmer is producing his products for less than cost—the fact that farm products have gone down to where they sell at less than cost of production—that the Government should compel a carrier to move that traffic for nothing, simply because it became necessary to move it for nothing in order to give the farmer a profit? You would not claim that, would you?

Mr. COWAN. Not unless the Government paid the carrier for doing it. That is not involved in my answer. My answer is—I need not repeat it—for the purpose of showing what I think has to be done under the present exigency of the situation to restore prosperity in the country, commerce has to move to restore it, and the railroads are at such an expense to-day that it must move at the highest rate the traffic will bear to move it, and you will never get away from that, and if the Government has got to pay for moving it, it has got to pay for it, that is all. It has got to move to restore prosperity in this country.

The CHAIRMAN. Well, Judge, do you recognize any difference in the policy that might arise that the railroads themselves voluntarily adopted, and the power of the Government to compel them to adopt that policy?

Mr. COWAN. Well, of course, that is kind of academic to me. I think, as I said the other day, that when the railroads construct their roads for the purpose of performing a public service, they are bound to do it, and whatever the Government demands they shall do, they are protected by the Constitution, and it affords more protection than they can possibly get out of it to-day.

The CHAIRMAN. That is what I mean. It might be good policy for a business man or a railroad, to use that as an example, to go on and do business for nothing for a period of time, but I doubt very much whether the Government, when it comes to regulate them, can compel them to do business for nothing.

Mr. COWAN. Of course they can not. That would be out of the question. If the Government is going to compel them to do it for nothing, the Government has got to pay for it.

The CHAIRMAN. But there are a number of people who are doing business now for nothing, or less than nothing.

Mr. COWAN. Yes.

The CHAIRMAN. But we can not compel them to do business for nothing.

Mr. COWAN. I think I will reach most of those points as we go along. My answers here have not been as complete as they should be in answer to your questions.

Senator WATSON. I went a little aside from your discourse to ask the question.

Mr. COWAN. But I do go to the point that we have been discussing, that the time has come, obnoxious as that may seem, that the railroads shall have all the traffic will bear and have the traffic move, not for this month or next, or during the season, or a year, but for a period of years. They have got to get all it will bear, and that will probably produce the most revenue to them. The highest rates they can put on, like they have put on, is destructive to the country and to the railroads both. There is no doubt about that.

The CHAIRMAN. I do not, myself, question the proposition that the traffic must move, but as I analyze it we have reached a time when the business of the country will not bear the charges for transportation that are necessary in order to give a fair return to those who have entered the business; that means simply that we have reached the time when the Government must become the owner of the railroads and supply whatever deficiencies may occur from taxation.

Mr. COWAN. That looks like one of the steps in the evolution of the times. I do not mean by that that I am advocating it. I do not. I would rather have that, however, than not have the traffic move and have the country paralyzed as it is to-day. But that is bad enough to contemplate, and it is not contemplated, I think. Certainly not in anything I shall have to say to the committee. I wish to put myself on record always as opposed to it.

The commission simply performed the task of establishing rates that would yield in the aggregate as nearly as may be the per cent (6) for the two years.

Further quoting from Ex parte 74:

"In establishing rates for the two-year period we have no discretion as to the amount of the fair return except that we may add to the 5½ per cent provided by law 'a sum not exceeding one-half of 1 per cent of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the commission, are chargeable to capital account.' Having determined the per cent, we are called upon to perform the administrative task of establishing rates that will yield in the aggregate as nearly as may be that per cent until March 1, 1922."

This is based on interest rates, apparently on the ground that interest rates had increased (pp. 226–227).

The same condition continues, so even had the 5½ per cent not been in the act the commission would have made it 6 per cent; if not, why did it add the one-half per cent?

I pause to make a remark here that that one-half per cent gives color to the whole situation. It was singular that the law as it finally was enacted said that they should add a half per cent for the purpose of enabling the railroads to make improvements and to acquire equipment, which, under the accounting rules of the commission, would be chargeable to capital account. Some way or other, I am under the impression that when the bill was first introduced by Senator Cummins it provided that an addition might be made for improvements which was not chargeable to capital account. I see no reason why it should be in there if it was chargeable to capital account.

The CHAIRMAN. The bill as I introduced it was that the basis should be 5 per cent, and then it had a recapture clause, that the surplus should not be recapitalized. We had a long struggle in the committee over whether it should be 5 per cent or 6 per cent, and I finally agreed to come up to 5½ per cent. That is the history of that part of it.

Mr. COWAN. But then, what I am speaking of is that this shall provide that the railroads should add one-half of 1 per cent to procure equipment and make improvements chargeable to capital account. That is exactly contrary to all the spirit of the bill and the discussion. The idea was that the shipper would not have to provide the capital upon which the railroad should charge the shipper for the use of it, but if it is chargeable to capital account it would have that effect.

The CHAIRMAN. That would not be the necessary conclusion. The purpose was to see that not more than 5½ per cent should be available for distribution upon capital. And the words "chargeable to capital account" means simply to prescribe what should be done with the extra one-half per cent if it should be granted.

Mr. COWAN. Well, this extra half per cent should be added to the profit. It would be a part of the cost or profit. And the idea of the law was that they should have 5½ per cent on the cost of their property, and the commission added that because the railroads showed that they needed 2,000 engines (locomotives), 3,000 passenger coaches, and 100,000 freight cars. That, in principle, is wholly wrong, in my humble opinion, that you should take out of rates the capital over and above the return that is stated to be fair and leave it to the discretion of the commission.

But it has been said that this act expires on the 1st of March, 1922. It is surprising to me to hear that statement made by those who have been so well acquainted with it, or had the opportunity to be, when the provisions of the act are that this 5½ per cent is merely a proviso for the interim of two years. The commission has to fix the per cent of return, and it did do it, and to the 5½ per cent added one-half per cent, in its discretion, and that makes 6 per cent. So when the time expired on March 1, I know of no good reason why it should not make it 6. I can see no reason why it ought not to be fixed, if the railroads upon reasonable rates can earn it, and I think they ought to. I mean, I think they ought to have it on reasonable rates. On roads

honestly built and favorably located they might have more, and on roads that were built on exploitation, and without sound judgment, they should suffer the consequences of their own want of judgment.

To continue with what I have written:

"That same condition continues, so even had the 5½ per cent not been in the act the commission would have made it 6 per cent; if not, why did it add the one-half per cent—

"'We are of opinion and find that the following percentage increases in the charges for freight service, including switching and special services, together with the other increases hereinbefore approved, would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and one-half of 1 per cent in addition; eastern group 40 per cent; southern group 25 per cent; western group 35 per cent, mountain-Pacific group, 25 per cent.'

"And force the shipper to pay for facilities chargeable to capital account their pay a return on that. The States were made to do that, though it was left discretionary with the commission on interstate traffic. It was only where roads were efficiently and economically managed that the rates were required to be so adjusted as to yield the per cent.

"On that subject no finding was made and the recitals show—page 227—that it was not a fact.

"Aside from investment accounts, no evidence of value is recited or existed to justify the $8,100,000,000 valuation for rate-making purposes. As to that item, the law—section 15a, paragraph 4—declares it shall be given 'only that consideration "which under such law as it is entitled'" (referring by the term 'such law' to the law of the land). When finally determined, the values under the valuation act (sec. 19a) is to be the value, but since the commission was naming an aggregate figure only, and no road has been finally valued or will be for years, probably, that is no evidence. The law refers to the valuations so far as it has progressed as an item which it may consider, but practically that was excluded as far as the western group and the mountain-Pacific group are concerned, because the commission said:

"'It is not deemed necessary for present purposes to apportion the aggregate value of the properties in the western group, as defined by carriers, so as to show the value of the properties in the western and mountain-Pacific group as we have defined them. Many important railroads are in and serve both groups into which we have divided the carriers in the western group and mountain-Pacific group. It is not thought advisable to delay the decision of this matter to permit an accurate apportionment of the value of such properties, particularly as it would not materially affect the determination we reach.'

"This is a most amazing statement in view of the aggregate value of the roads in the district and the fact of advancing the rates 35 per cent in the western group without the aggregate value to produce from the business there done 6 per cent on something—what is it? X, the unknown quantity. And 25 per cent advance in the mountain-Pacific for the purpose of producing the same percentage of revenue. Now, bear in mind, it was net railway operating income. That requires as known factors (1) gross revenue from operation, (2) operating expenses to produce it, and (3) joint-facility rents, debits, and credits. All the evidence was for a system operated as such in the entire district as to—

"(1) Gross revenue.

"(2) Operating expenses.

"(3) Joint-facility rents.

"(4) Property-investment account.

"(5) Par value of stocks, bonds, equipment, and trust obligations.

"The aggregate of each in the western group—the 35 per cent territory, as in the mountain-Pacific group—the 25 per cent territory were wholly unascertainable and unknown quantities"

I may pause in this reading to again advert your attention to the fact that the commission was fixing 35 per cent in the western group and 25 per cent in the mountain-Pacific group without a single stated factor, or one that was ascertainable, by which to arrive at those figures. And that is the case to-day, and no man has answered that criticism as yet.

Senator POINDEXTER. They have no information as to the net earnings, or net losses on the roads?

Mr. COWAN. Absolutely none with respect to the net value, gross revenue, net operating expenses, and net revenue as to the group where they put the 35 per cent, or the group where they put the 25 per cent. It is wholly incomprehensible that any such opinion should be rendered.

Senator FERNALD. Judge Cowan, do you know the effort the Interstate Commerce Commission has made to get the valuation of the railroads?

Mr. COWAN. You mean under the valuation act?

Senator FERNALD. Yes.

Mr. COWAN. No, sir; I am not familiar with that. I know they have not got it.

So the decision appropriately stated that a segregation of the values "could not materially affect the determination we reach;" that is, to increase rates 35 per cent in the western and 25 per cent in the eastern, solely by reason of the powers given by the provisions of section 15a.

They simply do it without a single factor.

The CHAIRMAN. That is not the fault of the law.

Mr. COWAN. No; but I am telling you that that is what has happened to the people.

To make confusion worse confounded, it must be borne in mind that Illinois was divided originally so that the part north of the Illinois River, and north of a line along the Santa Fe, including Chicago and all Wisconsin which was first in the western group, was taken out of that group and placed in the eastern group, including Mississippi River terminals on the west bank, except as to traffic moving to and from the west. If there were any place for aggregate value in the western group to be increased or decreased it must by this change have decreased to the extent at least that the property thus included in the eastern group which had been wholly in the western group was used in transportation on business therein and to and from the east, where the advance was 40 per cent. Thus all the big systems' value and gross revenue, operating expenses, net revenue, and property investment and stocks and bonds were shifted and the 35 per cent remained. This becomes the more amazing when it is considered that the railroads were required in all the States where they did not do it voluntarily to advance State rates the precise same per cent, on the ground that not to do so would be a discrimination against interstate commerce. And that entirely without regard to the value of the property in a State, and without regard to the fact that the act does not purport to give State commissions any power or take it away. Nor even inferentially require them to add the one-half per cent for improvements or equipment chargeable to capital account, and in disregard of the first section excluding State traffic from the provisions of the act. Only because of discrimination did the commission include it; and that based on the 35 per cent increase in the western group, determined wholly without a single factor as to that group being known or ascertainable.

Couple this with the fact that there was admitted inefficiency and extortionate costs and wages, the full responsibility being shifted to those who pay the freight, then view it in light of their bankruptcy, and who can deny that both the law and the decision in whole or in part has been most destructive of the producer from the soil and destructive to the railroads.

The remedy is, repeal this section of the law.

That leaves the commission its powers as they were before the war.

I wish this committee of Senators would, if they doubt my statements with respect to this decision, ask Col. Thom, whom I admire as a gentleman and a lawyer in every way, to point to a single factor upon which the Interstate Commerce Commission could base the 35 per cent increase in the western group, as a known factor that is produced by the railroads in fact, referred to by the Interstate Commerce Commission, or which is to-day ascertainable.

Senator POINDEXTER. Just a moment, Judge Cowan. What was that western group you spoke of? You said 35 per cent increase in the western group and 25 per cent in the mountain group. Well, the mountain group was the Rocky Mountain country. Now, where was the 35 per cent group?

Mr. COWAN. Between the Mississippi River and the Rocky Mountains, including the Illinois territory, to begin with, that was north of the Illinois River and the Chicago and west bank Mississippi River terminals, which subsequently was taken out of western and put in the eastern group.

Senator POINDEXTER. How about the Pacific coast rates to the terminal points? What was the increase there?

Mr. COWAN. Do you mean the transcontinental rates, Senator?

Senator POINDEXTER. The transcontinental rates; all the rates from the east, from any eastern points, to the Pacific coast terminals.

Mr. COWAN. The intergroup rates were all made 33⅓ per cent; is that correct, Mr. Thom? The mountain-Pacific territory lies west of the eastern line of Montana, and a line drawn from there to some point about the eastern border of Wyoming, on the Union Pacific, and thence up to Cheyenne, thence down to Albuquerque and El Paso; west of that is the mountain group.

Senator POINDEXTER. I know all about the mountain-Pacific group, but that does not include the terminal points on the Pacific coast.

Mr. COWAN. Oh, yes; it does. That includes the terminal points on the Pacific coast.

Senator POINDEXTER. Do they go in with the mountain group?

Mr. COWAN. All railroad terminals; yes.

Senator POINDEXTER. There is a vast difference in the rates; those are not based on the same factors at all; the intermountain country and the Pacific coast terminals.

Mr. COWAN. Well, I understand what you mean, but it is only the rates then on traffic moving wholly within the mountain-Pacific that will increase the 25 per cent, only.

Senator POINDEXTER. Oh, yes.

Mr. COWAN. All rates going into or out of that territory to others will be 33⅓ per cent.

Senator POINDEXTER. Well, that was what I was trying to get.

Mr. COWAN. Yes. All rates going into or out of that territory will be 33⅓ per cent.

Now, beginning with page 232, and continuing to page 245, the subject of needed revenue of the carriers in the different groups is analyzed and set out in form of argumentative conclusions, to reach the result of the percentages of increases to produce the 6 per cent return on the stated valuation in the eastern group and southern group, and in the western district comprising the two groups.

Mind you, the valuation at $8,100,000,000 was stated in the western district, and that comprised the territory known as the western classification territory, which will include the western group and the mountain-Pacific group, as first defined by the Interstate Commerce Commission. Maybe the western classification territory includes also all east of the Illinois-Indiana State line. I am not quite certain as to that. But the district is a statistical territory used by the Interstate Commerce Commission, that does embrace the western district, those two groups, as defined by them. The southern group was not divided. The eastern group was not divided. So the valuation in the eastern group and the valuation in the southern group was coextensive with the group except the eastern group was changed by adding to it Illinois and the terminals on the west bank of the Mississippi River, except as to traffic moving from or between western points and that territory.

It will be observed that the heading is used, on page 237, "Revenue needs of carriers in western group." Under that heading the commission treats of the district, as though it were a group, which is wholly erroneous because paragraph 2, section 15a provides for grouping into rate making territories or taking the country as a whole. Since it bases the 35 per cent on what it takes to produce 6 per cent that value must be stated for that group in the aggregate, else the prime factor is wanting.

Now the next point I take up is: "Begging the question."

The final conclusion is quoted as follows:

"We are of opinion and find that the following percentage increases in the charges for freight service, including switching and special services, together with the other increases hereinbefore approved, would, under present conditions, result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and one-half of 1 per cent in addition; eastern group, 40 per cent; southern group, 25 per cent; western group, 25 per cent; mountain-Pacific group, 25 per cent."

A most remarkable statement. Instead of going ahead and stating whether or not they were operating economically and efficiently, they state that if they make this increase it will enable the railroads under that character of operation, which is made a condition precedent to the exercise of power by the very law itself, earn that much money; that they would, if so operated, earn that much money.

The vital objections to the conclusion are:

First. It ignores the individual shipper or group of shippers and their right to reasonable rates, finding only that the percentages of increases "would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act." No such standard is contained in section 1. Every unreasonable and unjust rate is declared unlawful and prohibited. There is no such thing as a reasonable rate in the

aggregate in section 1. This proves the individual shipper was expressly denied consideration. The opinion proceeds, "and would enable the carriers in the respective groups to earn," etc.

That is taken bodily from the conditions named in paragraph (2), section 15a, down to and including the word "transportation."

Now I call your attention again to that, that it would under present conditions result in rates not unreasonable in the aggregate. Why, what benefit is the law to the shipper if the only determination of a commission can be what rates would be reasonable in the aggregate in the western group? Why, what benefit is it to the shippers down in Texas, or out in Wyoming, or up in Wisconsin, to have a law for somebody to provide what is an unreasonable rate or what is not an unreasonable rate in the aggregate? What consequence is it to him? It should be abolished. It is absurd on its face. And the statement of the Interstate Commerce Commission that this would result in rates not unreasonable in the aggregate is no finding at all with respect to the rights of the shipper, who must live or die in his business, so to speak, according to what rates he can get.

The CHAIRMAN. There is nothing of that kind in the law, Judge Cowan.

Mr. COWAN. Certainly not, certainly not. But that is what I am pointing to, that this decision has not been analyzed and put before you to show you what iniquity has happened to the country.

Senator POINDEXTER. Well, has this argument ever been made to the Interstate Commerce Commission in a motion for review or setting aside?

Mr. COWAN. I have told them about this several times, but then I might tell you a story now that I told the commission. It is a good deal like the case of an Italian who was running the eating houses of the Texas-Pacific Railroad in a very early day, by the name of Ginochio, who was a celebrated character, and who was prominent in the country, who had a lot of land dealings, and lived in Marshall, which was his headquarters. He had a lawsuit before the Federal court at Jefferson and employed a very celebrated lawyer of Texas, Bill Pope, to represent him, and he and his lawyer went down to the Federal court for a week or such a matter, and a number of prominent lawyers through the State were there at that time. Well, his case was heard, and when Ginochio got back to Marshall, which was only some 25 or 30 miles away, the people all came out to meet him at the depot, for he was a prominent citizen, and the station and his eating house and saloon were all there together. Bill Pope had carried down a lot of law books—there were no law books at Jefferson—and as Ginochio got off the train some one asked him, "Well, Ginochio, how did you come out with your case?" He said, "Billy de Pope he reada de law 10,000 page; de court he no pay no tensh."

Well, that answers your question.

Now let me illustrate the seriousness of this situation. It is of record and a fact, and has been published, I think, in the Congressional Record, that a man at Rock Springs, Wyo., shipped 2,000 sheep to Omaha. They could not be sold at Omaha for enough to pay the freight. They were then sent on to Chicago, and they were sold at a price that would pay the freight and leave net 32 cents a head. They were shipped over the Union Pacific Railroad, the only railroad for the shipper to possibly patronize, and do business with, because there is no other railroad in the neighborhood of Rock Springs, and neither would one patronize any other railroad than the Union Pacific if he had the opportunity. The Union Pacific is a double-track railroad, making big money, no question about that. Never has complained of wanting any guaranty of any sort. What remedy had he? His rates had been increased 33⅓ per cent. He had to pay it. If he had sold his sheep at Omaha he would not have gotten a cent. If he had sold his sheep there they would not have paid the freight and charges. So he sent them on to Chicago, and he did get 32 cents a head net. This construction of this act deprived that man of every possible remedy, and everybody else the same way, who happened to be similarly situated. He could not recover reparation, because he had paid no unreasonable rate, if this is the test. Because they increased the Union Pacific rates the same amount that they would the rates on the Moffatt Railroad, which never could pay, and yet there are $18,000,000 property investment included in this aggregate valuation.

Senator POINDEXTER. Is that under the railroad valuation act?

Mr. COWAN. No, sir; they took so close to the property investment account that they took it nearly all.

The Fort Worth & Denver Railroad in Texas was earning 16 per cent on its property valuation, I think, certainly more than that upon the Texas commission's value, which was an accurate one, but the Orient Railroad, which crosses the Texas & Pacific Railroad was running in the red all the time. Now a man shipping on the Fort Worth & Denver Railroad was entitled to a reasonable rate on his live stock to Fort Worth,

nobody would deny that. But the man that happened to ship over the Orient Railroad from some point on that road, going on to the Fort Worth & Denver Railroad, taking the aggregate of the two rates, could not have reduced it under any sort of consideration, probably. But this idea of an aggregate rate being not unreasonable, and therefore holding that the Fort Worth & Denver rate, however much it might earn upon its investment, must still remain as high as the figure for the aggregate, destroys completely the shipper's right over the Fort Worth & Denver Railroad.

Now the North Western Railroad was adverted to here, I believe. It certainly was referred to in an argument before the Interstate Commerce Commission yesterday, as having lost so much money; according to the statement of the tax commission of Wisconsin, which I saw published, it operated at an actual loss in Wisconsin of some three or four million dollars. Senator La Follette, perhaps you know?

Senator LA FOLLETTE. You mean the railroad commission?

Mr. COWAN. I thought it was the tax commission that reported it. It was the railroad commission, was it?

Senator LA FOLLETTE. I think so.

Mr. COWAN. Whoever reported it made that report; that the North Western Railroad lost that much in Wisconsin, and the Chicago, Milwaukee & St. Paul Railroad lost very heavily in the State of Wisconsin. Now, I made an inquiry into this matter. I go up there fishing sometimes; it is a good place to fish, whether you catch them or not. I made inquiry, and they told me that in all of that territory where I was fishing the rate on logs was so high that the men with hundreds of thousands of dollars invested in logs lying upon the track could not ship them to Merrill, the nearest sawmill, because the rates were so high that they could not move them, and hence the Chicago, Milwaukee & St. Paul road was doing no business.

I was told that the iron mines in northern Wisconsin were closed down for the same reason. And as the logging stopped, and the iron mines stopped, and the passenger fares and Pullman surcharges were fixed so high for fishermen, there were two roads without a guest that were not moving these things, and they are big systems that run into other territories, but it is the aggregate that must be made the rate for Jones, who pays the freight for a short distance, and Jones is ruined by that sort of a scheme.

Now, the plan never can work out, Senators; it never can work out.

Senator POINDEXTER. Well, you do not deny that the aggregate returns on the rates is one factor to be taken into consideration in rate making? I understand your complaint is that they did not take into consideration any other factor?

Mr. COWAN. That does not quite state my position, Senator. I claim that much, to say the least. I claim more than that. I claim that the aggregate of roads which are not owned by the same people is immaterial; they do not get the money; one road has not got any constitutional right to it because the other road does not earn the money. Competitive conditions that required the making of substantially the same rates on competitive lines induced the committee in the passage of this law to provide rates that would support all the railroads. That is an impossibility. They can not support them on the standard and theory that each one is to earn a percentage equal to what the best would be entitled to earn on reasonable rates.

Senator FERNALD. Well, Judge Cowan, if I understand you correctly, and I think I do, and I think I rather agree with you in very much of what you have to say—that section of the act which provides, for instance, that the Fort Worth and Denver Railroad, that can earn 16 per cent, after earning the 6 per cent provided for by the act, should turn a part of that over to the Orient Railroad, you consider unsound?

Mr. COWAN. Well, there is no provision of that kind in this law, but it certainly would be unconstitutional and unsound and foolish.

The whole purpose of the act to regulate commerce, as evidenced by the exact language of section 1, which is substantially as it was passed in 1887, except the additional carriers that are put into it, is that the individual who ships on a railroad is entitled to a reasonable rate, and to have a tribunal to determine that fact. It was the underlying principle of the Hepburn bill, and the only thing that was discussed. I was here a great deal in connection with that, and had much to do with it. That is the case with every State enactment upon the subject. Of course it had to fix rates for those similarly situated to avoid preferences and discriminations as between the shippers on a given railroad, but one railroad could not enjoin a rate as being confiscatory to another railroad. There is no such right in the Constitution or in the jurisprudence of the country.

We may be in an unfortunate situation in not having a national system of railroads, but you can not make it out of section 15a. It is impossible. And there will be many things that can not be corrected that may be evils, and we only make a stagger at correcting evils in this life anyway.

The CHAIRMAN. Well, Judge, prior to the enactment of the transportation act of 1920 the Interstate Commerce Commission did not make different rates for different railroads upon competitive business. That has not been done for years, since the days that the Interstate Commerce Commission began to function at all.

Mr. COWAN. That was true, and that was true that the railroads did not do it before the commission was established. The railroads had to make the same rates; whether they stuck to it or not, they had to make the same rates on all competitive railroads, or not get the business.

The CHAIRMAN. And yet one of your complaints seems to be, for instance, that the Fort Worth & Denver Railroad should carry freight that competes with that going on the Orient Railroad for a less rate.

Mr. COWAN. It would be bound to do it, or it would ruin everybody living on the line. It would ruin everybody living on the line of railroad if it did not do it, because the Orient Railroad can not be given a rate high enough to make any money. It has not got the traffic.

The CHAIRMAN. Certainly, I understand that. But nevertheless, you do not propose that we should command the Interstate Commerce Commission to fix the rates with reference to the condition of each particular railroad. That never has been done, and I do not think it could be done. For instance, suppose that on competitive business from New York to Chicago the needs of the Baltimore & Ohio were greater than the needs of the Pennsylvania Railroad. The Interstate Commerce Commission would not fix a higher rate for the Baltimore & Ohio Railroad than it fixed for the Pennsylvania on the competitive traffic, would it?

Mr. COWAN. Well, that is true, but, Senator, we are striking at little bit different points; we are shooting at different marks. What I said was that the underlying principle of the Interstate Commerce Act and the State enactments was to protect the individual in a reasonable rate for his traffic.

The CHAIRMAN. Well, now, I agree with you about that, and I do not know of anything in this law which interferes in any degree or changes in any degree the authority of the Interstate Commerce Commission in that respect.

Mr. COWAN. Oh, yes, I think it does in this particular. It does not go to the extent that the Interstate Commerce Commission went. But when you undertake to fix a standard for such groups as the Interstate Commerce Commission may select, and the commission selects a group as large as the western group, and that the rate shall be so adjusted as to produce an aggregate return, that means that some of the railroads, the best railroads have got to charge enough to make a very large return, and you provided that whenever that was in excess of 6 per cent it should be converted into a general railroad contingent fund. I say that takes away from the shipper his right to a reasonable rate.

The CHAIRMAN. That has always been done since the Interstate Commerce Commission first functioned, that is, since they had power to make rates for the future. The fact that in a particular group we have said that the Interstate Commerce Commission shall make rates which will as nearly as may be produce a certain return upon the value of the property rendering the service, does not command the Interstate Commerce Commission to make horizontal increases. It does not command the commission to raise one rate to make all rates the same.

Mr. COWAN. Well, they thought it did.

The CHAIRMAN. It says that in that group that the aggregate revenue net income shall be or ought to be enough to pay 5½ per cent upon the value of the property. But that does not interfere with individual making of rates.

Mr. COWAN. Well, it does if the Interstate Commerce Commission is to observe that in the group that they shall select. It accomplishes that. And it recognizes the fact that can not exist, and that is that all these railroads are entitled to an aggregate earning of a certain per cent; that whatever the group may be, that that group is entitled to an aggregate earning of a certain per cent. Now there is no such right except subject to the right of the shipper to have a reasonable rate for the service performed for him. It must always be subject to that, or it is no regulation.

The CHAIRMAN. And the Interstate Commerce Commission in its most recent decision has said that that is the dominating factor in that problem.

Mr. COWAN. Well, yes, they have said that, I admit, but now I am speaking of what it was that wrought the havoc in the country, and it still stands and is not overruled. I will show when I proceed a little further the practical impossibility of undertaking to make rates at all, or adjust rates at all upon a declaration and arbitrary requirement of law that they shall adjust it in this way. Let them use their judgment.

Now the Interstate Commerce Commission never did make rates to try to produce the revenue to all the railroads in a certain amount, that I know anything about.

They allowed the railroads to handle their business so as to produce it if they could, and when they have come to competitive lines they have said that the rates would have to be enough to support the principal competitive lines, but they have never gone to the length of laying down any arbitrary rule upon that subject. Or if they had it would have been only crippling themselves as a body to give relief to a community or to individual shippers, and if the community and individual shippers can not get relief through the administration of these laws, why then the railroads do not need it, because they can charge what they please.

The CHAIRMAN. That introduced, from my point of view, the only really new thing in the transportation act, namely, the grouping of the railroads. Of course that is experimental. But when you say that that has never been done before, I think you are in error about that, because every advance rate case, beginning with 1911, was based, and the Interstate Commerce Commission so considered the application of the railroad, upon the grouping of railroads, upon the aggregate revenue in the groups into which the Interstate Commerce Commission divided the country.

Mr. COWAN. Now, in those cases, Senators, those advance rate cases were new propositions. There was nothing in the law with respect to all the railroads in a territory going in and asking for advances of rates. It started and grew out of this proposal. Attorney General Wickersham had a bill before the committee, and it was agreed that if the railroads would make an application to the Interstate Commerce Commission for permission to advance the rates in the West, the Government would not undertake to enforce the injunction that stood against the Joint Traffic Association and all the railroads that belonged to it, and the Trans-Missouri Freight Association, and so on, and they did make that application, and thus they started a new thing not provided for specifically in the law, of all the railroads in the western territory asking for an advance in the rates, and that case was tried out in Chicago before certain of the commissioners, halfway an arbitration proposition, and the rates were not those involved by petition of the commission or petition of the shippers, and the carriers had no right to file a petition to make an order prescribing the rates under section 15 of the interstate commerce act. But for the purpose of determining whether the railroads, if they did file such tariffs, would be permitted to thus make such charges, and it would be open, of course, for the shippers to complain against the rates thus filed

Now then, they had two or three other such hearings, one in the East also, but there is a long history connected with that, that does not, in my opinion, create a precedent for the Interstate Commerce Commission grouping the country for the purpose of making rates. It was for the purpose of hearing a controversy that originated somewhat in the way I have just suggested. And I do not think it is conceivable that as long as the railroads are owned by separate corporations, are operated by separate corporations under varying circumstances and expenses and volume of traffic, and the like, that anything can be gained by adding two things together when there is no privity of earnings or contract or expenses or obligations or operations, and I think it was a very grave mistake. I say that with the greatest deference to the chairman of the committee personally, and to every member of the committee, and I am just seeking, seeing that it did not work out, to get the thing undone, and let us have open minds, and let us see if we had not better return to the standard of letting the commission determine, as it did successfully so long, when we had the greatest prosperity of the country, about the best plan that we have yet had, of making the rates as they were made before.

If the Interstate Commerce Commission is going to divide the country at all, if they are going to take jurisdiction of the States into groups, they are bound to make each State a group, as illustrated by the case of the State of Texas. Every one of our railroads, with the exception of the Texas & Pacific Railroad, is a State corporation, and all the statistics are kept there. They are under obligations to the State as entities of the State. They are valued in the State; their separate statistics are kept there. Now if the Interstate Commerce Commission were going to make the rates in Texas itself, surely the Interstate Commerce Commission ought not to make the rates according to what the rates ought to be in the aggregate clear on to the Canadian line as an average, to make rates for the State of Texas.

The CHAIRMAN. I do not want to argue the case with you, but that is the work of the Interstate Commerce Commission. There is absolutely nothing in the law—I am not criticizing the Interstate Commerce Commission; it may have proceeded in the only practical way—but there is nothing in the law that requires the rates to be made the same in every part of the group. There is nothing in the law that requires the rates to be the same even upon given commodities, unless a different rate creates a discrimination. The real trouble was, I fancy, that the Interstate Commerce Commission, urged by the necessities of the situation, adopted this horizontal and general

increase as the only practicable way to give the railroads the revenues which the commission thought that they ought to have. But there is nothing in the law that requires any raise of that kind.

Mr. COWAN. Well, I do not think any such thing was intended, Mr. Chairman, but three judges in the Wisconsin case, and some other of the judges, have held that the Interstate Commerce Commission was right in taking jurisdiction of the States on the ground that the State rate had to be the same percentage of advance as that fixed by the Interstate Commerce Commission on the interstate rates, to my utmost surprise, I will say that. But that is the way it stands, and that is the way it is in the Supreme Court. It has not been decided yet. But at all events, we have gotten into the situation where the Interstate Commerce Commission did do it, and Jones is up a tree, and I am talking for Jones, and I think the best way, since it can not work out any way, is to repeal it and return to our former standards. I do not want to consume too much time upon that, and I will proceed.

I was proceeding, then, upon the subject that there is no such thing as reasonable rate in the aggregate. But that is what the Interstate Commerce Commission determined, and that is the standard of this decision in Ex parte 74, and it is that that keeps every State and keeps every individual from having any remedy, or even a railroad, but once having established the amount of revenue, who would have the right to interfere with that? If it was unlawful to do it, if it was unlawful for the State to do it without creating a discrimination, it would be unlawful for the Union Pacific or for the Illinois Central Railroad to do it. And so we find that the railroads were themselves attempting to reduce rates, and they had to make application to the Interstate Commerce Commission, however much they wanted to do it.

I believe in a recent case Henry Ford—everybody makes fun of Henry Ford, but then we have got to have somebody to joke about—when he tried to reduce the rates on coal the Interstate Commerce Commission forbade him to do that. I do not know the history of that case, but I have seen some statements in the newspapers about it. But I do not see that a railroad could be permitted to reduce its rates any more than a State could reduce the rates below the 35 per cent in the western group, because if the one is unlawful, the other certainly is. That is, it is unlawful because it breaks into the standard that the Interstate Commerce Commission fixed for the aggregate.

I now come to my second point in the vital objections to the conclusion.

As to the western group or mountain-Pacific group, not a single factor was known or proven; nor is there anywhere in the opinion the basis for a single conclusion as to honest, efficient, and economical operation or results or what could or should be expected if such were the case. It was admittedly not economical or efficient, and this is stated at page 227, wherein it is stated that the carriers need 2,000 locomotives, 100,000 freight cars, and 3,000 passenger cars. Shippers agree that the service is bad. Witnesses for carriers were unable to state explicitly what economies might be effected.

But all the figures on which were based the calculations and speculations as to the net revenues required are those resulting from operation under the most profligate and wasteful and generally most expensive methods that would be possible.

That was upon the constructive year ending October, 1920, and based on those figures and those operations were the basic conclusions of the Interstate Commerce Commission as to what rates ought to be made in order to respond to the commands of this law.

Now, the Interstate Commerce Commission believed that that was the only thing it could do, honestly believed it. Well, I think they were mistaken, and the chairman of the committee thinks they were mistaken, but they got off with it, and the railroads did not get the money, because it began to turn out that they could not get the traffic, and it was like the celebrated English recipe for cooking a rabbit: First catch the rabbit. They did not have the traffic, the traffic stopped, and it has been going down, down, down, and will continue to go down as long as this rate system prevails.

Remember that the actual figures were produced as the railroads produced them. The percentage advances were based on them. To say, therefore, that these percentage figures will produce the results under the sort of management that must be shown to entitle them to the advance at all, is begging the question and in no sense a finding of fact, and is utterly inconsistent in point of fact with the very basis on which the percentage advances were allowed. Thus the value was assumed. The efficiency and economy of operation was assumed. The rates based on the percentage allowed were presumed to be reasonable.

As to the western group, and as to the mountain-Pacific group, the earnings, expenses, and net results and the value as to each group were not assumed or presumed. It simply was not attempted to be found out at all.

The commission made the percentage increases as to both with no evidence whatsoever to base it upon as to either. And that is my criticism on that opinion.

Now referring to some figures which it would be well, it seems to me, for the committee studying this thing out, to make some study of. I have produced in this case, at the expense of some $500 to get it up, which the stock men were not able to pay, a statement to show what each one of the western carriers would earn under the percentage of advance first proposed in the original application of 24 per cent for freight. And that showed as to each railroad system those which would earn more than 6 per cent, and those which would earn less, and those which might operate at a deficit. But it was not adverted to by the Interstate Commerce Commission in its decision at all. I had copies which were introduced as my Exhibit No. 1, in the trial of that Ex parte 74, and I thought I was bringing along a copy, but I did not bring it with me, as far as I could find, and I would like to present it to the committee. I did have the figures made, however, computations, with respect to the same matter, some of which I will furnish.

The CHAIRMAN. You can supply it hereafter, Judge Cowan, and it will be printed.

(The statistics compiled by Mr. Cowan, together with an explanatory statement, are as follows:)

EXPLANATION.

This table was introduced in evidence to show what would be the result of the operation of the railroads in the western district which was subsequently divided into the western group and the Mountain Pacific group with an increase of 24.10 per cent of freight revenue without any increase of passenger fare. It was made up prior to the award of the Labor Board of an increase in the wages in the aggregate of the United States approximating $625,000,000. Subsequent to that advance the railroads amended their application for increase in rates, including passenger and excess baggage, and the commission increased the rates on passenger and freight and added the Pullman surcharge and made an increase in excess baggage.

The first statement made by the railroads for the 24 per cent increase in the western district was for the purpose of producing the same net revenue, to wit, 6 per cent on the aggregate value, which the subsequent greater increase of gross revenue was asked for, therefore, the amount of the operating income in excess of 6 per cent on the lines which would show the excess as reflected by this table should have been substantially the same under the advance made in addition to the 24 per cent, in order to meet the increased cost arising from the wage increase made by the Labor Board.

The basis of this revenue is in the first column of property investment account, and the last column shows the amount of operating income in excess of 6 per cent. This table included a statement of back mail paid in the calendar year and in January, 1919, which really was for two years, and should have been distributed, but there was no exact basis for doing it. The change in the aggregate for the amount of operating income in excess of 6 per cent for that year when the mail pay was divided between the two years was about $10,000,000 less than the aggregate shown at the foot of the last column for 1919.

The point is, that in order to get the aggregate earning of 6 per cent on the aggregate value of the property in the western district, there would be earned $150,000,000 plus, to be divided between the railroads earning it and the Government—half and half. See table on page 296.

TABLE 1.—*Statement showing rate of return on property investment of Class I railroads in western district for the year ending Dec. 31, 1919.*

Road.	Property investment.	6 per cent on property investment.	Freight revenue, Dec. 31, 1919.	24.10 per cent freight revenue.	Net railway operating income, Dec. 31, 1919.	Net railway operating income plus freight rate advance.	Mail pay.	Net railway operating income plus freight rate advance and back mail pay.	Rate of return on property investment.	Income of road for which per cent on property investment is more than 6 per cent.	Amount of operating income in excess of 6 per cent.
Atchison, Topeka & Santa Fe	$777,937,827	$46,676,270	$144,743,867	$34,883,272	$38,289,457	$73,172,729	$3,202,234	$76,374,963	9.82	$76,374,963	$29,698,693
Bingham & Garfield	9,015,553	540,933	1,241,895	299,296	[1] 85,236	214,060	.....	214,060	2.37	.....	.....
Chicago & Alton	137,612,950	8,256,777	17,330,784	4,176,719	[1] 463,041	3,713,678	378,035	4,091,713	2.97	.....	.....
Chicago & North Western	451,433,733	27,086,024	93,386,607	22,506,172	12,120,486	34,626,658	1,578,000	36,204,658	8.02	36,204,658	9,118,634
Chicago, Burlington & Quincy	516,256,404	30,975,384	107,019,788	25,791,769	22,704,160	48,495,929	3,000,000	51,495,929	9.97	51,495,929	20,520,545
Chicago Great Western	136,004,997	8,160,300	14,555,496	3,507,875	919,848	4,427,723	305,227	4,732,950	3.48	.....	.....
Chicago, Milwaukee & St. Paul	661,731,984	39,703,919	106,288,453	25,615,517	2,493,985	28,109,502	2,250,451	30,359,953	4.59	.....	.....
Chicago, Peoria & St. Louis	8,640,912	518,455	1,321,917	318,582	[1] 881,672	[1] 563,090	18,740	[1] 544,350	.....	.....	.....
Chicago, Rock Island & Pacific	392,426,762	23,545,606	77,153,312	18,593,948	8,360,966	26,954,914	2,065,000	29,019,914	7.39	29,019,914	5,474,308
Chicago, St. Paul, Minneapolis & Omaha	86,020,834	5,161,250	18,335,828	4,418,935	2,436,157	6,855,092	374,360	7,229,452	8.40	7,229,452	2,068,202
Colorado & Southern	85,148,289	5,108,897	9,701,857	2,338,147	1,644,607	3,982,754	141,989	4,124,743	4.84	.....	.....
Colorado & Wyoming	5,051,668	303,100	253,772	61,159	67,000	128,159	.....	128,159	2.54	.....	.....
Copper Range	8,257,750	495,465	784,021	188,949	[1] 150,904	38,045	.....	38,045	.46	.....	.....
Denver & Rio Grande	184,923,530	11,095,412	24,099,452	5,807,968	5,666,577	11,474,545	256,320	11,730,865	6.34	11,730,865	635,453
Denver & Salt Lake	18,247,844	1,094,871	2,382,875	574,273	[1] 1,052,417	[1] 478,144	13,800	[1] 464,344	.....	.....	.....
Duluth & Iron Range	31,060,556	1,863,633	7,114,957	1,714,704	2,915,786	4,630,490	14,673	4,645,163	14.95	4,645,163	2,781,530
Duluth, Missabe & Northern	44,011,025	2,640,662	17,950,815	4,326,146	10,805,734	15,131,880	11,000	15,142,880	34.41	15,142,880	12,502,218
Duluth, South Shore & Atlantic	49,219,812	2,953,189	3,201,976	771,676	[1] 70,600	701,076	74,750	775,826	1.57	.....	.....
Duluth, Winnipeg & Pacific	3,618,795	217,128	1,546,567	372,725	134,807	507,532	.....	507,532	14.02	507,532	290,404
Fort Smith & Western	12,248,854	734,931	1,195,998	288,235	242,223	530,458	.....	530,458	4.33	.....	.....
Fort Worth & Denver City	28,153,704	1,689,222	7,112,886	1,714,206	2,763,601	4,477,807	102,467	4,580,274	16.27	4,580,274	2,891,052
El Paso & Southwestern	59,162,518	3,549,751	9,983,206	2,405,952	2,314,638	4,720,590	130,708	4,851,298	8.20	4,851,298	1,301,547
Great Northern	484,263,806	29,055,828	77,618,311	18,706,013	11,925,199	30,631,212	2,300,000	32,931,212	6.80	32,931,212	3,875,384
Green Bay & Western	12,920,467	775,228	1,240,895	299,056	80,753	379,809	.....	379,809	2.94	.....	.....
International & Great Northern	44,434,649	2,666,079	10,061,736	2,424,878	[1] 1,478,441	946,437	236,056	1,182,493	2.66	.....	.....
Kansas City, Mexico & Orient Ry	29,280,007	1,756,800	2,269,612	546,976	[1] 1,251,391	[1] 704,415	16,539	[1] 687,76	.....	.....	.....
Kansas City Southern	102,094,687	6,125,681	12,576,430	3,030,943	1,982,990	5,013,933	.....	5,013,933	4.91	.....	.....
Lake Superior & Ishpeming	4,459,618	267,577	888,829	214,208	272,113	486,321	.....	486,321	10.90	486,321	218,744
Los Angeles & Salt Lake	86,499,689	5,189,980	11,777,101	2,838,281	3,285,980	6,124,261	149,616	6,273,877	7.25	6,273,877	1,083,897
Louisiana & Arkansas	12,452,671	747,160	1,638,905	394,976	[1] 177,205	217,771	21,640	239,411	1.92	.....	.....
Louisiana Ry. & Navigation Co.	21,768,026	1,306,082	2,909,375	701,159	[1] 60,738	640,421	.....	640,421	2.95	.....	.....
Midland Valley	17,348,492	1,040,910	2,782,289	670,582	222,605	893,137	23,053	916,190	5.28	.....	.....
Mineral Range	3,790,079	227,405	724,214	174,586	[1] 117,303	57,233	250	57,483	1.51	.....	.....
Minneapolis & St. Louis	65,540,681	3,932,441	10,002,843	2,410,685	[1] 202,650	2,208,035	223,613	2,431,648	3.71	.....	.....

Minneapolis, St. Paul & Sault Ste. Marie	195,950,785	11,757,047	31,621,077	7,620,663	4,708,807	12,329,470	147,469	12,476,939	6.37	12,476,939	719,892
Missouri & North Arkansas	18,505,344	1,110,321	983,417	237,003	[1] 683,902	[1] 446,899		[1] 446,899			
Missouri, Kansas & Texas System	251,687,053	15,101,223	41,283,080	9,949,222	1,531,529	11,480,751	825,231	12,305,982	4.89		
Missouri, Oklahoma & Gulf Ry	12,729,889	763,793	1,367,004	327,448	[1] 994,847	[1] 665,399	8,015	[1] 657,384			
Missouri Pacific	378,939,266	22,736,356	66,559,805	16,040,913	4,155,718	20,196,631	1,615,560	21,812,191	5.76		
Navada Northern	3,938,728	236,324	1,522,581	366,942	354,581	721,523		721,523	18.32	721,523	485,199
New Orleans, Texas & Mexico	36,297,791	2,177,867	6,224,275	1,500,050	1,226,590	2,726,640	104,850	2,831,490	7.80	2,831,490	653,623
Northern Pacific	495,383,171	29,722,990	73,047,876	17,604,538	15,239,582	32,844,120	1,074,610	33,918,730	6.85	33,918,730	4,195,740
Northwestern Pacific	67,862,717	4,071,763	3,615,941	871,442	1,070,314	1,941,756	44,944	1,985,700	2.93		
Quincy, Omaha & Kansas City	6,243,742	374,625	732,310	176,487	[1] 208,846	[1] 32,359		[1] 32,359			
St. Joseph & Grand Island	19,025,757	1,141,545	2,271,927	547,534	[1] 69,742	477,792	37,366	515,158	2.70		
St. Louis-San Francisco	387,995,812	23,279,749	49,121,757	11,838,343	12,823,325	24,661,668		24,661,668	6.35	24,551,668	1,381,919
St. Louis Southwestern System	111,556,724	6,693,403	15,821,318	3,812,938	1,376,284	5,189,222	108,636	5,297,858	4.75		
San Antonio & Aransas Pass	24,780,518	1,486,831	2,953,328	711,752	[1] 1,166,062	[1] 454,310	82,670	[1] 371,640			
Southern Pacific System	1,049,741,139	62,984,468	163,011,660	39,285,810	39,580,683	78,866,493	2,280,527	81,147,020	7.73	81,147,020	18,162,552
Spokane International	5,219,439	313,166	1,008,041	242,938	316,247	559,185		559,185	10.71	559,185	246,019
Spokane, Portland & Seattle	92,200,650	5,532,039	5,492,306	1,323,646	1,175,255	2,498,901	55,800	2,554,701	2.77		
Texas & Pacific	125,074,545	7,504,473	23,575,837	5,681,776	3,419,292	9,101,068	376,435	9,477,503	7.58	9,477,503	1,973,030
Toledo, Peoria & Western	10,242,121	614,527	961,829	231,801	[1] 222,037	9,764		[1] 9,764	.90		
Trinity & Brazos Valley	11,631,797	697,908	1,121,669	270,322	[1] 625,588	[1] 355,266		[1] 355,266			
Union Pacific System	652,969,168	39,178,150	128,975,831	31,083,175	44,264,380	75,347,555	176,173	78,523,728	12.02	78,523,728	39,345,578
Utah Railway	7,770,675	466,241	1,301,109	313,567	457,029	770,596		770,596	9.92	770,596	304,355
Vicksburg, Shreveport & Pacific	10,077,205	604,632	2,075,839	500,277	334,602	834,879	31,912	866,791	8.60	866,791	262,159
Western Pacific	93,780,247	5,626,815	11,227,665	2,705,867	3,373,652	6,079,519	54,500	6,134,019	6.54	6,134,019	507,204
Wichita Valley	5,495,509	329,731	781,980	188,457	[1] 25,016	163,441	18,469	181,910	3.31		
Total	8,666,138,954	519,968,337	1,437,856,331	346,523,379	257,069,904	603,593,283	26,931,688	630,524,971	7.28	533,563,530	160,697,881
5½ per cent on property investment		476,637,642									

[1] Deficit.

Per cent increase necessary to add to Dec. 31, 1919 railway operating income, to return 6 per cent on property investment, 16.41.
Per cent increase necessary to add to Dec. 31, 1919 railway operating income, to return 5½ per cent on property investment, 13.39.
NOTE.—Figures taken from reports filed by carriers and from Interstate Commerce Commission.

I submit a table, No. 2, that is a statement containing a list of the railroads which under column 9 of the foregoing table would earn more than 6 per cent. The mileage, value per mile according to property investment account, the amount of net operating railway income, and the amount in excess of 6 per cent after apportioning one-half of the mail pay. This includes the 93,249 miles of railroad in the western district which would earn more than 6 per cent. This was for the same calendar year ending December 31, 1919.

TABLE 2.—*A statement containing a list of the railroads which earn more than 6 per cent.*

Name of railroad.	Mileage.	Value per mile of line.	Net operating income.	Operating income in excess of 6 per cent, less one-half of mail pay.
Atchison, Topeka & Santa Fe System	11,492	$67,695	$38,289,457	$28,097,576
Chicago North Western	8,406	53,704	12,120,486	8,329,634
Chicago, Burlington & Quincy	9,373	55,080	22,704,160	19,020,545
Chicago, Rock Island & Pacific	8,080	48,567	8,360,966	4,441,808
Chicago, St. Paul, Minneapolis & Omaha	1,749	49,126	2,436,157	1,881,022
Denver & Rio Grande	2,597	71,206	5,666,577	507,293
Duluth & Iron Range	292	106,337	2,915,786	2,774,193
Duluth, Missabe & Northern	412	106,823	10,805,734	12,496,700
Duluth, Winnipeg & Pacific	179	20,217	134,807	290,404
Fort Worth & Denver City	454	62,013	2,763,601	2,839,818
El Paso & Southwestern	1,028	57,551	2,314,638	1,236,193
Great Northern	8,342	58,039	11,925,199	2,725,384
Lake Superior & Ishpeming	34	131,162	272,113	218,744
Los Angeles & Salt Lake	1,168	74,058	3,285,980	1,009,089
Minneapolis, St. Paul & Sault Ste Marie	4,243	46,182	4,708,807	646,157
Nevada Northern	168	23,445	354,581	485,199
New Orleans, Texas & Mexico	919	39,497	1,226,590	601,198
Northern Pacific	6,581	75,275	15,239,582	3,658,435
St. Louis-San Francisco	5,165	75,121	12,823,325	1,381,919
Southern Pacific System	11,048	95,016	39,580,683	17,022,289
Spokane International	157	33,309	316,247	246,019
Texas Pacific	1,947	64,240	3,419,292	1,784,812
Union Pacific System	8,103	80,584	44,264,380	37,757,493
Utah Railway	99	78,492	457,029	304,355
Vicksburg, Shreveport & Pacific	171	58,931	334,602	234,909
Western Pacific	1,042	90,096	3,373,652	497,970
Total	93,249	.....	250,094,431	150,489,158

I submit a table, No. 3, of roads earning from 4 to 6 per cent, comprising 26,366 miles of road, with an aggregate net operating income of $13,649,941.

TABLE 3.—*Statement showing a list of railroads earning from 4 to 6 per cent.*

Name of railroad.	Mileage.	Value per mile of line.	Net operating income.
Chicago, Milwaukee & St. Paul	10,648	$62,146	$2,493,985
Colorado & Southern	1,101	77,337	1,644,607
Fort Smith & Western	254	48,271	242,223
Kansas City Southern	862	118,439	1,982,990
Midland Valley	388	44,713	222,605
Missouri, Kansas & Texas System	3,840	65,543	1,531,529
Missouri Pacific	7,173	52,829	4,155,718
St. Louis Southwestern System	2,100	53,122	1,376,284
Total	26,366	.....	13,649,941

Alton same as Santa Fe.

I also submit a table, No. 4, entitled statement showing railroads earning less than 4 per cent, comprising 12,762 miles, with a deficit of $6,674,468.

TABLE 4.—*Statement showing railroads earning less than 4 per cent.*

Name of railroad.	Mileage.	Value per mile of line.	Net operating income.
Bingham & Garfield	38	$237,251	[1] $85,236
Chicago & Alton	1,052	130,811	[1] 463,041
Chicago Great Western	1,496	90,912	919,848
Colorado & Wyoming	44	114,812	67,000
Copper Range	162	50,974	[1] 150,904
Duluth, South Shore & Atlantic	600	82,033	[1] 70,600
Green Bay & Western	364	35,496	80,753
International & Great Northern	1,159	38,511	[1] 1,478,441
Louisiana & Arkansas	302	41,234	[1] 177,205
Louisiana Railway & Navigation Co	350	62,194	[1] 60,738
Mineral Range	101	37,525	[1] 117,300
Minneapolis & St. Louis	1,647	39,794	[1] 202,650
Northwestern Pacific	527	128,771	1,070,314
Quincy, Omaha & Kansas City	255	24,485	[1] 208,846
St. Joseph & Grand Island	258	73,747	[1] 69,742
San Antonio & Aransas Pass	737	33,623	[1] 1,166,062
Spokane, Portland & Seattle	851	108,344	1,175,255
Toledo, Peoria & Western	248	41,291	[1] 222,037
Trinity & Brazos Valley	369	31,523	[1] 625,588
Wichita Valley	257	21,383	[1] 25,016
Chicago, Peoria & St. Louis	247	34,983	[1] 881,672
Denver & Salt Lake	255	71,560	[1] 1,052,417
Kansas City, Mexico & Orient	737	39,728	[1] 1,251,391
Missouri & North Arkansas	365	50,699	[1] 683,902
Missouri, Oklahoma & Gulf Ry	341	37,331	[1] 994,847
Total	12,762	.....	[1] 6,674,468

[1] Deficit.

I also submit a table No. 5, of 25 principal roads in the western district comprising 102,083 miles showing valuation adjusted upon the basis of 83 per cent of the property investment account except as otherwise indicated, and wherever it is marked "I. C. C." in the last column the figures are those reported as tentative values by the engineers of the Interstate Commerce Commission showing the cost of reproduction new plus land value less depreciation. Certain roads we assumed to be of the same value per mile as others, because similar, but that is indicated. This adjustment of 83 per cent was explained in my testimony as the basis which Mr. Thorne had worked up by taking the entire valuations as far as made in the United States, tentatively made by the engineers of the commission and ascertaining the per cent thereof to the property investment account of the same railroads. Subsequent compilation and statements of value show that these figures are too high: For example, the Rock Island lines average about $34,500 per mile for the entire system, whereas in this compilation it is taken as $40,822. The adjusted value upon the basis used makes a reduction of $1,617,839,154, bringing it down for these 25 roads to $4,054,485,711, which, divided by the 102,083 miles, gives $39,717 per mile. If reduced, as the Rock Island shows, then $34,000 would be too high as an average.

TABLE 5.—*Amount of reductions.*

Carrier.	Miles of line.	Adjusted value per mile.	Total deduction for line.	Investment stated by carrier, Dec. 31, 1919.	Basis of adjustment.	Adjusted investment.
Atchison, Topeka & Santa Fe	11,492	$56,186	$132,249,431	$777,937,827	83 per cent	$645,688,396
Chicago & North Western	8,406	44,574	76,746,780	451,433,733	.....do	374,686,953
Chicago, Burlington & Quincy	9,373	45,715	87,763,588	516,256,404	.....do	428,492,816
Chicago, Rock Island & Pacific	8,080	40,311	66,712,549	392,426,762	.....do	325,714,213
Chicago, St. Paul, Minneapolis & Omaha	1,749	40,822	14,623,542	86,020,834	.....do	71,397,292
Denver & Rio Grande	2,597	71,210	.....	184,923,530	O. K.	184,923,530
Duluth, South Shore & Atlantic	600	33,616	29,048,974	49,219,812	I. C. C.	20,170,838

TABLE 5.—*Amount of reductions*—Continued.

Carrier.	Miles of line.	Adjusted value per mile.	Total deduction for line.	Investment stated by carrier, Dec. 31, 1919.	Basis of adjustment.	Adjusted investment.
Colorado & Southern	1,101	$64,189	$14,475,209	$85,148,289	83 per cent	$70,673,080
Kansas City Southern	862	58,993	51,243,098	102,094,687	I. C. C.	50,851,589
Fort Worth & Western	254	40,145	2,088,024	12,284,854	83 per cent	10,196,830
Missouri, Kansas & Texas	3,840	54,401	42,786,798	251,687,053	do	208,900,255
Missouri Pacific	7,173	43,848	64,419,681	378,939,266	do	314,519,585
St. Louis Southwestern	2,100	34,626	38,842,124	111,556,724	Same as Texas & Pacific.	72,714,600
Great Northern	8,342	50,132	66,059,271	484,263,806	I. C. C.	418,204,535
International & Great Northern.	1,159	34,626	4,303,115	44,434,649	Same as Texas & Pacific.	40,131,534
Texas & Pacific	1,947	34,626	57,656,134	125,074,545	I. C. C.	67,418,411
Louisiana & Arkansas	302	34,626	1,995,619	12,452,671	Same as Texas & Pacific.	10,457,052
Louisiana Railway & Navigation Co.	350	34,626	9,648,926	21,768,026	do	12,119,100
Minneapolis, St. Paul & S. Ste. Marie (Soo).	4,243	27,033	81,249,674	195,950,785	I. C. C.	114,701,111
Southern Pacific	11,048	56,186	428,998,211	1,049,741,139	Same as Santa Fe.	620,742,928
Northern Pacific	6,581	50,132	165,464,479	495,383,171	Same as Great Northern.	329,918,692
San Pedro, Los Angeles & Salt Lake.	1,168	40,387	39,387,970	86,499,679	I. C. C.	47,111,709
Union Pacific	8,103	66,885	111,004,764	652,969,168	83 per cent	541,964,404
Vicksburg, Shreveport & Pacific.	171	34,626	4,156,159	10,077,205	Same as Texas & Pacific.	5,921,046
Western Pacific	1,042	64,170	26,915,026	93,780,246	I. C. C.	66,865,220
Total	102,083	39,717	1,617,839,154	6,672,324,865		4,054,485,711

The Texas lines as shown by the briefs filed for 16,000 miles of railroad, including all property used in transportation at the value of about $30,000 per mile.

As you will observe, a number of cheap roads operating at a deficit are not included in this list, and if they were that would reduce the general average. However, the value taken from the investment account of the roads earning less than 4 per cent are absurdly high in many instances, as will be observed by a mere glance at the tables. For example, the Chicago & Alton showed $130,811 per mile property investment account, whereas the Santa Fe, parallel and in all particulars the better road, shows a property investment account of $67,695 per mile.

Another element to be taken in consideration in connection with these tables, as reflected upon the decision in Ex parte 74, is that the Chicago terminals and part of the lines in the State of Illinois and the terminals on the west bank of the Mississippi River are included in these property investment accounts but should be excluded from any value used as the basis of rate making except in so far as the property in that district was used in transportation of traffic to and from the West. Those terminals much increase values per mile and in the aggregate far greater than the average would be without them.

For convenience, I have numbered these tables 1, 2, 3, 4, and 5.

The conclusion is inevitable that the valuation of $8,100,000,000 for the roads in the western district—that is, for these roads listed accordingly as the railroads themselves list them in Table No. 1—establish a basis of rate making which is absolutely impossible. It amounts to over $61,000 per mile for 132,400 miles, class 1 roads; nearly twice too much for rate making. If the scheme worked to furnish the 6 per cent, it would take one hundred and fifty million out of the pockets of the people to pay the freight, one-half to the reserve to the railroads which earn it and the other half to the railroad contingent fund for the benefit of the commerce of the United States, or otherwise, in which the shipper is in no wise considered and as to which he is under no obligations to pay.

It did not reach the 6 per cent; on the contrary, many of the roads are operating in the red, so the scheme is impossible, and, besides, it is wholly and entirely wrong.

Mr. COWAN. I wish to refer presently to some certain figures. In the western district there were 26,366 miles of railroad which would have earned from 4 to 6 per cent.

There were 93,249 miles of railroad that would earn 6 per cent or more.

There were 12,000 miles of railroad earning less than 4 per cent, and operating at a deficit principally. The net operating result of those 12,000 miles of railroad was $6,000,000 deficit.

I have not the percentage figures in the document which I have as to the individual railroads, but there were a number of these roads which would have earned a very high earning upon their property investment account, and that was the only figure that we had, but Mr. Thorne worked up a method of reducing property investment account to the equivalent of the valuations that have been made of the railroads of the United States, so far as they had progressed, and that showed 83 per cent of the property investment account.

Now, adjusting on that basis those roads which have not been valued, and adjusting on the basis that they actually were valued, those railroads which the Interstate Commerce Commission valued, I worked up the figures to show what would be the value, and the value per mile of line, of these different railroads.

The valuation was the most disastrous thing. It was a valuation commanded by law for the purposes of rate making. That is an unknown term, an indefinite term, as indefinite as is "a fair value," as is a "reasonable rate" itself, and where the object is to secure some basis for a reasonable rate, and you take factors which are themselves as uncertain and undefinable as the ultimate object to be obtained, you gain nothing by it; you had better jump to the conclusion at the outset, short-circuit in one shot as to what is a reasonable rate. And you never can beat that. You can study every day, at least I could study every day until I was 100 years old—and that won't be so long—and could not reach any other conclusion, in my opinion.

I have tried to work out in my mind what would be the remedy which would be appropriate, and the only remedy that Congress can adopt that will relieve this unhappy situation. I wish to advert again to the point that so long as those who produce the basic wealth of this country have no profits left with which to purchase, the industries, finances, commerce, and every other thing, including the railroads, must be in a state of paralysis; they must be in a state of paralysis just as long as that condition exists.

Now we have built up this country on the theory, so far as the West is concerned—and that is what I am speaking of—by the foresight and the far-seeing wisdom of great men who constructed the railroads to move the traffic; their idea was that they would develop a country that in the long run would make these railroads great and prosperous properties. They were liberal in their dispositions and thought, and they did it, and thus it was that our country was built up.

Now we find a vast territory capable of supporting the entire population of the United States in the things to eat, to say nothing of things to drink, which is a matter only to be thought of in connection with history. That territory lying in the semiarid and arid countries, the intermountain countries, and the plains adjacent thereto, far away from the points at which they must find markets, incapable of development at all unless they can find those markets. Now these great railroads were built for the purpose originally of developing all along their lines, and so, as far as farming made progress the country did develop, until it reached that area where it would require irrigation and where there was mining and where there was timber, and then by the influx of population the country was developing to some extent, until this era of making money out of the railroads by high financing, or by financing at all, and making every part of every railroad pay a profit, arrived, and the high rates were put on the intermountain country, and they have paralyzed it and left the Government with a great territory that will never be developed unless it is developed on the theory that what they make they can ship and sell at a profit, and not throw potatoes in the river and hunt places, as they have in California, to dump the onions or, has as been done in southwestern Texas, on the Brownsville line of railroad, where 1,500 cars of cabbage, I am told, rotted this year, and the onion crop could not be marketed. The country is simply paralyzed by the inability to get what they thought they would get when they went there—that is, transportation at reasonable cost.

Now, I say I have tried to work out, in view of all these situations, the plan that I think will be the only one that can be adopted to restore us to the chance of a development of the business of the country, and the return to the maximum of railroad traffic, the maximum of employment of labor everywhere, the maximum of employment of the ingenuity of men in the manufacture and the sale of commodities to those who will have something left to buy them with, and that must come, in my opinion, from the ground.

Now, I will take up the subject:

REDUCTION OF RAILROAD RATES ESSENTIAL TO THE NATIONAL PROSPERITY AND THE DUTY OF CONGRESS TO THE PUBLIC AS WELL AS THE RAILROADS.

With the enactment of the act to regulate commerce, approved February 4, 1887, the Federal Government entered upon the experiment of protecting the helpless public, shippers, and communities against unreasonable, preferential, and discriminatory rates by commission without power to prescribe the rates. Failing in that, for lack of power, Congress in 1906 passed the Hepburn Act, giving the power which was beneficially exercised for 15 years, but now unhappily yet undeniably we have come to the point where that power is taken away by our efforts to perfect it by a statutory rate-making rule that leaves the public and shipper without a remedy. Not even the railroads can make reasonable rates, nor can a single road reduce its rates. The States are shorn of their powers, the shippers deprived of adequate remedies, commerce and production are stifled by rates 65 to 100 per cent above the average of the 25-year period of prosperity next before the war. Net earnings are much less, notwithstanding the exorbitant rates which are bankrupting the farmer and stock raiser, depriving producers of their accustomed markets or materially reducing them, both as to domestic and export, and depriving the consumer of access to wide fields of production for what he lives on, and making the high cost of living permanent; limiting the scope of commercial transportation from places of industrial production and resulting in closing down factories, mines, mills, and enterprises, and causing unemployment everywhere.

Generally speaking, it costs as much to ship corn and oats as the farmer gets at home. So it is with vegetables, melons, and potatoes, where rates are often prohibitory. Poorer quality of cattle and sheep often do not more than pay the freight, and on medium qualities shipped long distances the freight is more than 50 per cent of net value at home. Hay is often not worth the freight to available and usual markets. Agriculture is thus hopeless because the producer has nothing left; his buying power is gone; in consequence much less is shipped. Whatever the farmer buys in macninery and supplies comes with these rates added. The buck is passed to him on the f. o. b. factory price. In thousands of instances industries have wholly or partially closed Exports and imports are in like manner burdened, so from the remotest parts of the world important commodities like wool and frozen meat, hides, etc., can be shipped to our ports cheaper than from any of our own fields and places of production.

The wonder is that no relief is proposed to reach the cause of the lessened traffic, unemployment, higher cost of living, and the paralysis of our great bankrupt live stock and farming business, and crippled condition of most industries. The cry is, loan us some more money, help us float more obligations, and paraphrasing the Lord's prayer, "forgive us our debts." Conceivably, it is because of the heralding of specious fallacious arguments that the bad financial, often bankrupt, condition of our railroads forbids reduction of rates, but calls for higher rates.

This is merely indicative of the havoc wrought by the arbitrary rate-making rule of the transportation act, section 15a, of the commerce act, guaranteeing 5½ per cent net return on the aggregate of all railroad valuation used by the commission for rate-making purposes. The country can not pay it, and the railroads can not earn it if there were no regulating law, and yet it seems they are so tenacious of these exorbitant rates resulting from the effort to make that return under this iniquitous law and so powerful as to prevent a repeal of it by Congress, that the country and the railroads must go down together in this vain attempt to do the impossible. They are intelligent men, and we should expect—indeed, do expect—that they will soon see it in a different light.

The railroads must stand their share, and it should be by reducing rates and increasing traffic rather than reducing traffic by high rates to bankrupt patrons.

It is charged by them to labor cost, and specific advances of rates and fares were asked for and obtained to meet the $625,000,000 added by the Labor Board; yet when that was reduced by half no reduction in consequence thereof was made in the general level of rates. Traffic continues to decline, and if the standard of the rate-making rule used by the commission is reached still higher rates will be required on traffic that must move. While some rates are being reduced at the suggestion of the commission, it is a confession that it is without power since the rate of return is not produced. Thus we take what the railroads see fit to give. We could always have done that.

The cause of this condition—these exorbitant rates—must be reduced. There is no other remedy. The remedy that increases the interest charges by floating additional securities and which they are asking, and indeed being in instances permitted

to issue by capitalizing surplus, but adds to the fixed charges is no remedy. No act of Congress can make railroads prosper by destroying the source of their business and bankrupting the producer.

Neither can the cost of living be reduced to a proper level till the rates permit the abundance of production to reach markets of consumption at reasonable rates, thus stimulating competition. That will reduce cost of living, and in turn, wages may be brought to a proper level and units of cost on units of the greater abundant traffic decreased.

This rate making rule is for revenue only as to which no shipper is given a right to complain. He can not even complain that the railroad he patronizes is making more than the 5½ per cent to secure a reduction. The test could only be applied to the large group and the sum total and not what each road earns net; that is the basis of calculation of all the rates, using the value of the aggregate group without regard to the value of any particular line or system, and with no possible knowledge but a guess as to what the volume of the traffic or any kind of traffic will be under the advances of rates. It is assumed that all traffic will continue to move under the high rates yet everyone knows the contrary. It challenges one's intelligence to present this scheme as a basis of reasonable rates and belies the first section of the act declaring that all rates shall be just and reasonable and that unjust and unreasonable rates are prohibited.

EXCESSIVE VALUATION FOR RATE-MAKING PURPOSES.

It may be laid down as fundamental that the true value for rate-making purposes is to be found by what railroads can earn on reasonable rates, and no fair value for rate-making purposes can be determined by what the railroad owes, is bonded for, or the par value of its stock. That would be an unfair value. With all these schemes to guarantee returns on inflated values in operation, what would the roads or all of the capital issues and obligations sell for? Why should they be taken as worth more than that?

The fatal mistake was made by the commission taking as a value a sum far in excess even of the aggregate par value of stocks and bonds. Congress would never have enacted such a standard. It would have shocked the conscience of a profiteer, but Congress blindly lets the people suffer for it. Why should it be so? The scheme of the rate-making rule shifts to the public the misfortune of any exorbitant wages, excessive costs of supplies and materials; waste and profligacy in management, bad judgment, unwise adventures and misadventures of railroad building or manipulation, and makes the public guarantee 5½ per cent net after paying taxes. This on inflated value. Rates resulting from use of this standard are by the commission (Ex Parte 74) declared to be not unreasonable. Does that make it so? But look at the wreck and ruin they have wrought to everybody including the roads. Thus the old standard of the sound judgment of the commission in lieu of that of the carriers as to what is unreasonable, which was the very reason for creating a commission, is brushed aside by this transportation act in the vain attempt to make rates to produce such earnings absolutely regardless of consequences and ignoring entirely the factor of the value of the service and whether the traffic will freely move to and from accustomed points of production and consumption; that is regardless of what the traffic will bear.

That is the standard under this act as construed and applied by the commission; surely not its judgment as to what the rates ought to be, but its judgment as to what Congress required it to do to produce the revenue. Having stated the aggregate value in each group of all railroad property devoted to transportation as the prime factor—that was a matter left to its discretion—it is multiplied by the per cent—5½ plus one-half for improvements and equipment—and taking the traffic of the group at the composite unit of per ton and per passenger mile, reflected by past operations under former rates, compute what percentage advance of the rates would be required to produce the aggregate net return. This the commission did, and on that computation estimated that an increase of 40 per cent in the eastern group, in a general way lying east of the Mississippi River and Chicago and north of the Ohio and Potomac; 25 per cent in the southern group, lying south of the eastern; 35 per cent in the western group—lying west of the eastern to Montana and along the Santa Fe to El Paso; and 25 per cent in the mountain-Pacific, lying west of the western group, would be the proper figure. General Order 28 of the Railroad Administration in June, 1918, had advanced freight rates 25 per cent with certain limitations. So the advances were laid on the war-time rates thus advanced. There is, according to the logic of the decisions of the commission, not a single factor left by the law to the commission's judgment except valuations used in the computation, unless it be to guess at what the traffic will be. Under this scheme a good guesser and computator

should be the principal qualification of the commissioner. He can not apply judgment as to what is just, fair, and reasonable and fix rates accordingly as heretofore.

The best that could be done in the first instance is to repeal section 15a and leave the commission to prescribe rates according to its sound judgment, according to the facts and circumstances of the case where shippers and the public have a tribunal to whom all can go to submit to its judgment the controversy and abide by that.

WHATEVER BY WAY OF GUARANTY IS REQUIRED MUST BE THE NATION'S OBLIGATION, NOT IN SHIPPER'S RATES.

The old rule of railroading was axiomatic that development of tonnage by rates that the traffic would bear and freely move, has been discarded; so no longer are rates made to develop but rather to destroy. But the rule is sound; it was the development from experience. It affords the only true remedy. Whatever course may be followed to do it plainly must embrace the reduction of rate by force of law. The national must pay the price to the extent that it should be paid and producers can not be burdened with that obligation. The national, not the pruducers, must shoulder the guaranty. That is what ails them now. The direct calamity which the railroads predict to themselves, the farmer likewise suffers, his losses will not be replaced or earnings guaranteed. But what would result to the railroads before the volume of business is restored and cost of labor, materials, and supplies reduced to put them back to doing business at the same old stand in the same old way can and should be taken care of by the Government in performance of the Nation's duty as a whole by providing for such aid as will protect the railroads to the extent to which under close supervision it may be found needed. Let the loan to each be by supplying the funds, sufficient when added to their net earnings, which will enable each to pay its interest and taxes, to be paid back on an amortization plan out of the net earnings above that figure derivable from future operations as earned, with the proviso to except cases of overcapitalization interest charges and to take care equitably of other special cases to the ends of just and fair treatment.

True this would require close scrutiny of expenditures and to see that only operating expenses are charged to that account and that the needs for the loan to augment net earnings for paying fixed charges be correctly ascertained. That scrutiny is absolutely necessary in any event so that the public can know the real net earnings. As it is they know what the railroads report.

This scheme of the transportation act makes the public the guarantor of the correctness, propriety, and necessity of everything charged in operating expenses by guaranteeing the net. Under this plan suggested above the Government could lose nothing and the railroads would be forced to gain back the traffic and restore industry which they seem unable to attempt by reducing the rates to the former standards plus enough to take care of what the Labor Board has allowed to be added to former wages. Keeping in view the strictest economy and efficiency of operation under close watch would greatly benefit the roads. Rigid requirements to prevent employment of any army for propaganda and traveling and local advocates to further their plans and give publicity to specious arguments in support of the railroad's views, is another way to reduce expenses. They should not charge operating expenses for that as they do.

Again, in the repeal and change of provisions of the transportation act there should be borne in mind that one tribunal can not make the rates and another tribunal fix the wages. So that, to that end wage control must be in the tribunal which controls the rates. Too many boards, like too many cooks, spoil the broth. So it may be with respect to fuel to some extent. If the public is to have reasonable rates unreasonable expenditures must cease, at least when the public guarantees the net.

It requires no peculiar knowledge for any one to see that with rates restored business will be rapidly restored and unemployment cease to an enormous degree. It is next to folly to preach protective tariff to stimulate production and keep home markets from disastrous competition, yet allow rates which lay such burdens upon our own production in getting it to consumers as we now "enjoy." The unwisdom of "captains of industry" in running railroads and government has been abundantly demonstrated. Why prate of the high cost of living when dressed carcasses of beef cost 114 per cent more to ship from western packing houses than it did before the war. When thousands of cars of fruits, vegetables, melons, and potatoes have rotted because of prohibitory rates. Why don't they voluntarily reduce these rates? Take a chance. Stand their temporary loss to get themselves and the country going again?

If that can not be compelled by statute or by so changing the law that the commission can do it, and if we are to continue these high rate bases, there is no use to have any regulation by statute; it must all be left to the roads, if such must be the rule.

Congress will have to reduce these rates, that is restore them. That is not invading the proper functions of the commission. Had it the power to-day to do it it could not make the requisite reductions as it has not the power to give that aid that Congress must do as an assurance against railroad collapse while normalcy of business is restored under the reduced rates.

The Constitution guarantees that private property shall not be taken for public use without just compensation. But the Supreme Court and the statute declare that the public is entitled to reasonable rates as the basis of the fair return upon the fair value of that which is devoted to the public use. These rights this act destroys. Repeal it and get back to common-sense reasonable rates. Whatever aid must be given it is the Nation's obligation, after the shipper has paid a reasonable rate, which on the whole can never be more than the traffic will bear. This experiment has proven it.

The real best interest of both the public and the railroads in last analysis is identical. To reach that common point of a live and let live policy is the crying need of the hour as the Nation's problem as it is that of the railroads and producers.

Now, Mr. Chairman, I desire to read some resolutions demanding the repeal of this section of the act. In doing so I will state that all of those organizations of shippers who pay the freight are out of money, and therefore, looking at it from the viewpoint of the public interest, are a unit in favor of the repeal of section 15a. We called a meeting at Chicago last spring on the subject. There were a large number of representative organizations which participated in the call. They are as follows:

American Farm Bureau Federation, by J. R. Howard, president.

National Live Stock Shippers' League, by J. H. Mercer, president; S. H. Cowan, Clifford Thorne, Grady Cary, attorneys.

American National Live Stock Association, by T. W. Tomlinson, secretary; S. H. Cowan, general counsel.

National Paving Brick Manufacturers' Association.

American Face Brick Association.

Hollow Building Tile Association, by Francis B. James, attorney.

Farmers' National Grain Dealers' Association, by Frank M. Meyers, secretary.

Fort Worth Chamber of Commerce.

West Texas Chamber of Commerce.

Texas Industrial Traffic League, by E. P. Byars.

Everett C. Brown, president National Live Stock Exchange.

National Federation of Cooperative Live Stock Shippers' Association, by Knute Espe, president; M. R. Myers, secretary.

American Fruit and Vegetable Shippers' Association, by R. Cumming, secretary.

National Petroleum Association, by C. D. Chamberlin, general counsel and secretary.

National Association of Sand and Gravel Producers, by Guy Sutton, executive secretary.

E. J. Brundage, attorney general for the State of Illinois.

B. J. Gibson, attorney general for the State of Iowa.

U. S. Lesh, attorney general for the State of Indiana.

Charles Webster, chairman legislative committee of National Association of Railway Commissioners.

Merlin Wiley, attorney general for the State of Michigan.

L. L. Thompson, attorney general for the State of Washington.

Roy L. Black, attorney general for the State of Idaho.

L. B. Fowler, attorney general for the State of Nevada.

American Independent Petroleum Association, by C. L. Maguire, president; J. D. Reynolds, secretary.

Independent Oil Men's Association, by E. E. Grant, secretary.

J. V. Norman, attorney, Louisville, Ky.

American Mining Congress, by J. F. Callbreath, secretary.

Interstate Cotton Seed Crushers' Association, by R. A. P. Walker.

A resolution was there adopted in favor of repeal of section 15a, and there were several other resolutions adopted with respect to matters of transportation that would come under your general investigation, and while I am present here and have this in my hand, and being one of the committee that was appointed to present these resolutions to the proper committees in Congress, I wish to read these resolutions into the record.

The following resolutions were adopted by the conference (reading):

"RESOLUTION NO. 1.

"*Be it resolved by the National Shippers and Consumers' Association in convention assembled at Chicago, March 14, 1921*—

"(*a*) That we favor the repeal of section 15a of the act to regulate commerce, known as the rate-making rule, as added in the transportation act of 1920.

"(*b*) That we favor such amendment to the act to regulate commerce as shall specifically define the right, power, and jurisdiction of the Interstate Commerce Commission with respect to the making and rendering of any decision or prescribing any rate which shall have the effect of destroying the right, power, or jurisdiction of a State with respect to intrastate rates and transportation. And that where the Interstate Commerce Commission, by reason of the fact that a rate of any State or intrastate traffic constitutes a discrimination or preference as against interstate rates or commerce, that it is the duty of the Interstate Commerce Commission to make an order against any carrier to cease or desist from collecting such intrastate rates. The Interstate Commerce Commisison must, as a condition precedent to such order, specifically define such rate and make a finding of facts with respect thereto, and that no such order shall be made except as to correct an actual, material, and plain discrimination or preference and further that such State rate is unjust and unreasonable for the service performed. Which decision of the Interstate Commerce Commission shall be subject to be set aside by a court of competent jurisdiction at the suit of the State when such decision is beyond its power or contrary to law, and, during the pendency of which such court may suspend such order."

"RESOLUTION NO. 2.

"Whereas the increased rates of freight are in many instances prohibitory, and in other instances restricted, and in all cases burdensome upon the commerce of the country, thereby preventing, curtailing, and limiting production, and depriving farmers, stock raisers, producers, and manufacturers generally of an opportunity to do business, destroying their profits and paralyzing the industries of the country because the traffic can not fully move; and,

"Whereas there can be no revival of business so that production, trade, and commerce can be restored to a normal condition, and a return of prosperity brought about without a material reduction in these rates; and

"Whereas the operating expenses of the railroads are enormously increased by the wages, the working conditions and rules under which they are operating, reflecting a direct burden upon the industries of the country and creating a paralysis of its business in every direction; and

"Whereas we believe that it is imperative that the Government exercises its reasonable constituting powers to the end of so changing these conditions that the railroad companies shall exercise their right as owners of the property to pay such wages as are just and reasonable and that will permit them to transport the commerce of the country upon rates which will freely move traffic and yet pay a reasonable wage according to the conditions: Now, therefore, be it

"*Resolved by the National Shippers and Consumers' Association in convention assembled in Chicago, March 14, 1921*, That the transportation act, establishing the Labor Board be so amended that the power of the Government may be administered by that tribunal, that the wages shall be just and reasonable according to the circumstances and the railroads not compelled to pay more than will permit them under economical management to move the traffic of the country under rates which are just and reasonable and which will permit the farmers, stockholders, and producers from the soil, the sources of primary wealth, to make a competency and earn a living and continue production to supply the vital needs of the people."

"RESOLUTION NO. 3.

"Whereas in Ex parte No. 74, the commission stated that under their order there should be a readjustment of commercial conditions and that they expected the carriers to confer with the shippers and bring about such commercial readjustments without resort to the commission. The carriers have wholly failed to make any such adjustments and the appeals of shippers to the railroads to make such adjustments have fallen on deaf ears: Therefore, be it

"*Resolved*, That the Interstate Commerce Commission, under its power to initiate and modify rates, should proceed at once to make such adjustments so as to move the traffic of the country."

"RESOLUTION NO. 4.

"*Be it further resolved,* That every common carrier should make just and reasonable distribution of cars for the transportation of all commodities, and that there should not be specially assigned cars and that every car should be counted. We believe that this rule should be applied not merely to coal but to all commodities. We, therefore, urge that paragraph 12 of section 1 of the interstate commerce act, as amended by the transportation act of 1920 be amended so as to make its provisions applicable not merely to coal, but to freight of all kinds. We, likewise, desire to point out that the Interstate Commerce Commission held that under said paragraph 12, that it had power to suspend said paragraph in case of emergencies. This act of the commission was sustained by the courts. We, therefore, move that said paragraph 12 be further amended so as to take away from the commission the power to suspend the said principles embodied in said paragraph 12 amended as suggested.

"RESOLUTION NO. 5.

"Whereas paragraph 13 of section 1 of the interstate commerce act, as amended by the transportation act of 1920, provides that the Interstate Commerce Commission may require the carriers to file their car service rules as a part of the published tariffs. The Interstate Commerce Commission has wholly failed so to do: Therefore, be it

"*Resolved,* That said paragraph 13 be amended to the effect that the Interstate Commerce Commission shall require the carriers to file their car service rules with the commission as regularly published tariffs.

"THE TRANSPORTATION COMMITTEE.

"To present the resolutions to Congress and to carry out the expressed will of the conference, the following transportation committee was created:

"J. R. Howard, president American Farm Bureau Federation, chairman.

"J. F. Callbreath, American Mining Congress.

"S. H. Cowan, National Live Stock Shippers' League and American National Live Stock Association.

"Charles Webster, National Association of Railway Commissioners.

"The chairman was authorized to appoint such other members to act on the transportation committee as he may deem necessary to further the objects of the conference."

I think there were some 130 different organizations of shippers represented at this meeting. It was a very large meeting, but they were like other organizations of the kind: They did not have any money. Every live-stock organization in this country is bankrupt to-day, could not get the money to pay the expenses which that organization has incurred. Aside from the farm bureau federations, I know of no organizations of shippers that are not in the same condition, so far as their activities in the way of legislation and controversies over rates is concerned. The pople are in a helpless condition. I am speaking for people who are poverty stricken, who have been wealthy, who have had an abundance of the wealth of the earth, who have seen their ranches and farms and places yield them a living and some profit, and they are in dire distress, and they are demanding, wherever they can get the opportunity to speak it, that they get relief and they are talking a lot about the Interstate Commerce Commission, they are talking a lot about Congress not granting relief.

It is a complex subject, and the individual does not know what to strike at. He does not know where to point to; to write you or to write any Member of Congress what he thinks ought to be done, because he can not think on a subject where his mind has not the possession of the complete lot of facts that will enable him to form for himself a judgment. And that is the case when men meet in the aggregate, in conventions and the like. And only those who have given it some complete study, in the great complexity of the situation, can work out for themselves a thought upon the subject.

In fact I find—and I do not say it by way of criticism—that many Members of Congress are stalled, as we say of a schoolboy when he meets a sum in arithmetic that he can not unravel, and they lay the things aside for a future day. And the people are wont to say, "Well, I have an abiding faith in the American people, and these things will all work out." Senators, they will not work out. They are working day by day to the detriment of the agricultural and live stock producer, the producers of the wealth from the ground, the primary wealth of the Nation, of the public and the carriers.

It is perfectly impossible that these people working in cities now at very small wages can pay 8 cents to ride on a street car. It shocks my conscience when in Fort Worth I get on a street car, when the railroad was built for the purpose and got its franchise to haul people for a nickel, and they charge the people 8 cents for it, and it is not necessary. It is giving to that capital an undue advantage over the unorganized public, and unless the Senate and the House can protect the people against that sort of a thing, where are they going to receive any help?

Senator STANLEY. Right there at that point, I am very much interested in what you say. I am impressed with the conditions which you describe, especially touching the distress of agricultural and live-stock interests. But just how can this Congress relieve a condition, say in Texas, where a municipal corporation charges too much for the transportation of passengers?

Mr. COWAN. Do you mean the street railroad?

Senator STANLEY. Yes.

Mr. COWAN. I am speaking of that only in a general economic sense.

Senator STANLEY. Yes.

Mr. COWAN. But if I were a member of this Senate, and of this committee, the Armistice Day would not have passed until I had a bill that proposed to put 5 cents car fare in the District of Columbia. They can do that. I remarked that yesterday. I came from the Interstate Commerce Commission's office to the Raleigh Hotel and paid 8 cents car fare. I pay 8 cents every time I get on a street car here in Washington. The poor working girls do that. Now that is too much. And it is in your power to correct that.

Senator STANLEY. No; it is not in the power of this committee.

Mr. COWAN. Well, it is in the power of Congress, Senator, to do that.

Senator STANLEY. Well, that originates in the District of Columbia Committee, not this committee.

Mr. COWAN. Well, I would just introduce it on general principles. The working girl that works down here for $9 a week pays her 16 cents a day to this corporation, which I know can afford to carry people in Washington city for 5 cents, and everybody knows it. And if wages have to be reduced, let them be reduced. I would abolish the Labor Board if the Labor Board stands in the way of reasonable wages according to the standard of what other people must live on and pay. I would abolish it any way, because I say you can never have one body, one tribunal, fixing the charges that the public pay, and make then reasonable, and have another tribunal with the power to fix how much that corporation shall pay to somebody whom they employ, and thus deprive the corporation of its opportunity to operate its private property to its best advantage and meet the obligation to charge only reasonable rates, which the law commands of that corporation.

I now wish to read two of the resolutions which were adopted at the midyear meeting of the American National Live Stock Association held at Salt Lake City, Utah, August 26–27, 1921, as follows [reading]:

"RESOLUTION NO. 5.—REDUCTION OF FREIGHT RATES ON LIVE STOCK.

"Whereas the Interstate Commerce Commission in Ex parte 74, putting into effect the act restoring the railroads to their owners, further increased the rates on live stock that already had been increased during the war, thereby making an unreasonable and prohibitory standard of rates on all lines west of Chicago; and

"Whereas, commencing previous to that date and continuing thereafter, the value of live stock rapidly declined, so that by the beginning of the year 1921 the industry was facing bankruptcy and it became evident that it was impossible for it to survive and pay the exorbitant and unreasonable rates established; and

"Whereas this association and other live-stock organizations on January 4, 1921, filed a petition with the Interstate Commerce Commission challenging such rates as being unjust, unreasonable, and prohibitory, and seeking to remove the advances made under Ex parte 74, as well as those made during the war, and to restore the prewar rates; and

"Whereas, after the trial of said cause in June of this year, wherein a number of State railroad commissions and the American Farm Bureau Federation intervened in support of plaintiffs' case, the commission, on August 3, handed down its decision (63 I. C. C., 107), holding that said rates had not been shown to be unjust and unreasonagle, but suggesting that because of the economic conditions surrounding the live-stock business, the great decline in prices, and the financial disaster that had befallen it, the railroads should reduce the rates for the longer-distance hauls, where they exceeded 50 cents per hundred pounds, by the amount of 20 per cent,

and making no recommendation as to whether the rates for the shorter distances should likewise be reduced; and

"Whereas the reduction of 20 per cent, though inadequate, will bring a large measure of relief, and it is greatly to be desired that such reduction be made immediately; and

"Whereas the other rates are likewise unjust and unreasonable, and the reduction should be extended to cover the entire live-stock rate structure in the western district; and

"Whereas the value of live stock on the market and on the range has declined to the basis of prewar prices or below, while costs of production have not been proportionately reduced, so that the business is in a bankrupt condition throughout both the corn belt and the range States, and

"Whereas the Interstate Commerce Commission, deeming it to be the law that it is compelled to so adjust rates as to produce a 6 per cent net return, as nearly as may be, on the aggregate value of all railroad property in the district, thereby invites a reckless disregard of the rights of the shipper, the producer, and the public; and

"Whereas the commission should be relieved of the necessity of observing the arbitrary rule contained in section 15a of the transportation act, providing for the 5½ per cent guaranty out of the shippers' pockets; and

"Whereas it is the duty of Congress to repeal said section and to enact such laws as will enable the Interstate Commerce Commission to exercise its sound judgment in determining what rates are just and reasonable, and otherwise so to amend the law that it may operate in justice and fairness to all concerned: Now, therefore, be it

"*Resolved*, That the railroads should immediately comply with the recommendation of the commission to reduce the rates.

"2. That the railroads should extend the reduction to all live-stock rates, thus removing by 20 per cent the horizontal advance of 35 and 25 per cent made in Ex parte 74.

"3. That this association urges all live-stock and agricultural interests to unite in a demand upon Congress for the repeal of section 15a of the act to regulate commerce, and for the restoration to the Interstate Commerce Commission and the State commissions of full powers to make just and reasonable rates, without being handicapped by arbitrary rules.

"4. That a united effort should be made by this association and all other live stock and agricultural organizations to secure from Congress a restoration of the rates as they existed prior to the war, as nearly as may be done in justice to the railroads.

"5. That if, in justice to the railroads, it should become necessary to grant them temporary relief, such relief should be afforded by Congress by loan of a sum of money sufficient for that purpose, under some plan for its repayment after the restoration of the business to a normal condition of prosperity.

"6. That we urge upon Congress the granting of such relief to the railroads as a national obligation, and that the live-stock and agricultural industries of this country, which pay a double burden in advanced rates on all their products as well as on everytihng which is shipped to them, should not be required to make good such guaranty as is now provided by law and the decision of the Interstate Commerce Commission, and be it further

"*Resolved*, That copies of these resolutions be furnished to each Member of Congress, to organizations of producers and shippers throughout the country, and to the press.

"RESOLUTION NO. 6.—REPEAL OF SECTION 15A OF TRANSPORTATION ACT.

"Whereas there has been introduced in the Senate of the United States, by Senator Arthur Capper, of Kansas, a bill to repeal section 15a of the act to regulate commerce and to restore to the State commissions the power to make rates; and

"Whereas said section 15a, as it has been construed by the Interstate Commerce Commission, destroys the power of the States to restrict rates on transportation wholly within their own territory; and

"Whereas it involves an unreasonable obligation on the part of the shippers to afford a specific revenue to the railroads, to the serious detriment of the live-stock and agricultural industries; now, therefore, be it

"*Resolved*, By the American National Live Stock Association, at its midyear meeting in Salt Lake City, Utah, August 26–27, 1921, that we urge the prompt passage of the said Capper bill."

Now, as to the State of Texas, I wish to have the privilege of filing here at the close of this statement a brief prepared by the attorney general of Texas and myself and Mr. S. C. Rowe of the Cattle Raisers' Association, in the case in which the Interstate

Commerce Commission seized the final jurisdiction and commanded the commission of Texas, which had put 33⅓ per cent increase instead of 35 per cent, to put on the other 1½ per cent, when it was admitted that in the whole State it could not amount to more than $250,000 a year. I told the Interstate Commerce Commission in argument that there was no excuse for taking jurisdiction there except a desire to have it. There was no discrimination proven or shown.

In that case we showed what the value was, as found by the Interstate Commerce Commission's engineers, on 3,900 miles of railroad in Texas, which was a less value than our own railroad commission found for those roads. And taking the entire valuation, proven in Texas without controversy, without a dispute, the Interstate Commerce Commission completely declined to consider it when it came to raise the rates in the State of Texas, basing it upon the theory that having said 35 per cent was reasonable in the group, Texas was discriminating if, by the small matter of 1½ per cent, it should fail to fix those rates on a small part of the traffic at exactly the same line as the Interstate Commerce Commission fixed in percentage for the Western group.

Senator POINDEXTER. Did they apply that generally in the State of Texas?

Mr. COWAN. Everywhere.

Senator POINDEXTER. If that principle is to prevail, that destroys absolutely the power of the State commissions, does it not?

Mr. COWAN. Yes, sir. So that the examiner of the Interstate Commerce Commission, an administrative tribunal of the Government, can go down to the State of Texas and wipe out its constitution with one stroke of the pen, without the State having its day in court. Now that is the situation.

The CHAIRMAN. The committee, I think, will find it necessary to suspend at this point. As I understand the arrangement there will be no meeting of the Senate to-morrow and none on Friday, probably none on Saturday. In view of what is to occur during these three days I think it will be necessary to adjourn the further hearing until next Monday.

I assume, Judge Cowan, that you have finished?

Mr. COWAN. Well, Mr. Chairman, I am not entirely through. There is not much more.

Senator POINDEXTER. Can we go on with this hearing this afternoon, Mr. Chairman?

The CHAIRMAN. Well, the railroad bill is before the Senate to-day, and I can not go on so long as that is under hearing.

Mr. COWAN. There is not very much more that I care at this particular juncture to present. But I wish to put into the record this brief with respect to the values in Texas, and to show that the valuation there is not but about one-half per mile of line what it figures out for the western district, that the Interstate Commerce Commission allowed as a basis for these rates.

The CHAIRMAN. That will be incorporated in the record.

(The brief presented by Mr. Cowan is not printed in the record but a copy is on file with the committee.)

Mr. COWAN. I wish to read from the report of the Interstate Commerce Commission in No. 11764, in the matter of intrastate rates within the State of Texas, the following:

"Evidence relating to the earnings of the carriers on State traffic was received over objection of counsel for the State commission, and in order to afford that commission an opportunity to submit similar data in its possession, upon which it had predicated its findings, a further hearing was ordered. The record as supplemented contains the calculations relied on by the Texas commission as establishing the fact that an increase of 33⅓ per cent in intrastate freight rates, added to the amount derived from the increased interstate rates and fares, would yield the carriers fully 6 per cent net return on the property investment in Texas.

"We deem it unnecessary for the purposes of this report to enter upon a discussion of the testimony and exhibits dealing with the valuations of railroad properties in Texas and the earnings of the carriers on State traffic. In a proceeding similar to this increased rates within Illinois (59 I. C. C., 350) it was urged that in prescribing the measure of the increases to be applied to the rates and charges of the carriers throughout the country necessary to yield the return fixed by Congress for the two years beginning March 1, 1920, we had failed to determine the values of the railroad property separately in that and other States. We pointed out therein that Congress had laid upon us the duty of prescribing rates so that in the aggregate they would yield a certain return, as nearly as may be, "upon the aggregate value of the railroad property of such carriers held for and used in the service of transportation," and expressed the view that the interstate commerce act required us to determine upon a valuation for the total property of the carriers and not for the property that might be assigned to interstate traffic.

"We adhere to that view and repeat that, in our opinion, *the manifest intent of Congress was to repose in us full and final authority to provide the revenues found necessary to yield the specified return by considering the entire structure of rates, both State and interstate, and the aggregate value of the railroad property held for and used in the service of transportation without regard to State lines*, and to protect interstate commerce against any rate, fare, charge, classification, regulation, or practice that causes any undue, unreasonable, or unjust discrimination." (The italics are ours.)

There are a good many things I would like to say about the Shreveport case, so much misunderstood, the doctrine so much amplified, that to my mind it is the greatest absurdity that exists in this whole matter, is the supposed doctrine of the Shreveport case as applied by the Interstate Commerce Commission, so much so that the rate on cactus shipped for feeding cattle in Texas is affected by the so-called power over discrimination as between Texas and Shreveport, to which none ever moves. And there at the start, the history of the case is destructive of the exercise of the power that they do exercise under the doctrine of the Shreveport case, and it ought to be removed. I can demonstrate that, I think, to any body of fair-minded men.

The CHAIRMAN. We have had 10 days now of continuous hearings and largely upon this same question.

Mr. COWAN. Well, I am afraid that they did not get right down to the bone, but I will get at it on some points that I know about the Shreveport case. I do not suppose I ought to mention it to you, that the commission, in order to fix rates on lignite in Texas did it upon the ground of discrimination with Shreveport, when not a car of lignite ever moved to Shreveport, or could, because they had gas right under the town. And they fixed it on cordwood for the same reason.

The CHAIRMAN. The witnesses who have appeared here before have asked us to modify the doctrine as announced by the Supreme Court, and they have presented proposed amendments to that effect.

Mr. COWAN. Yes; but if you should see the extent to which they use that doctrine, as actually applied in the case there in Texas, then you would see how bad the disease is and how much it needs a remedy. I would like to be permitted to at least submit something to the committee concerning that, if I am not able to appear before it at a future time.

Senator POINDEXTER. I hope you can appear. I would like very much to hear you further on that subject.

Senator STANLEY. So would I.

Mr. COWAN. Well, I do not suppose you would do anything before you adjourn this session of Congress?

Senator POINDEXTER. Not likely.

Mr. COWAN. And on some future day I would like to appear on these bills, if I can. I would like to reserve that and the right to file a brief, if the committee will so allow. And to submit certain statements to show how these different railroads earn and do not earn anything under this sort of a scheme, that makes it so impractical to aggregate them into one whole for the purpose of determining what the rates ought to be en each.

With those reservations, the hour having arrived for an adjournment, why, I will be bound to suspend for this hearing.

The CHAIRMAN. We will adjourn the hearing until next Monday morning at 10 o'clock. It is expected that at that time the representatives of the railroads will be heard.

(Whereupon, at 12 o'clock, an adjournment was taken until Monday, November 14, 1921, at 10 o'clock a. m.)

73337—21—PT 2——4

MODIFICATION OF TRANSPORTATION ACT, 1920.

MONDAY, NOVEMBER 7, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman), presiding.

The CHAIRMAN. The committee will come to order. We will hear Mr. Thorne this morning.

Mr. Thorne, we are considering the bill introduced by Senator Capper, and the bill introduced by Senator Nicholson, to repeal certain portions of the transportation act. I assume you are somewhat familiar with those bills?

Mr. THORNE. Yes, sir.

The CHAIRMAN. If you will give us the benefit of your observations now, first state your name, and your general relation to this subject.

STATEMENT OF MR. CLIFFORD THORNE, GENERAL COUNSEL FOR THE AMERICAN FARM BUREAU FEDERATION, CHICAGO, ILL.

Mr. THORNE. My name is Clifford Thorne, and I appear for the American Farm Bureau Federation, for which I am general counsel.

There are two propositions which I desire to discuss briefly in the bills referred to by the chairman. First, the wisdom of restoring immediately the full powers of the State commissions, removing all ambiguity in the law relative thereto; and second, that you should strike from the transportation act those clauses which attempt to force the Interstate Commerce Commission to make rates sufficient to produce a given fixed percentage, whatever that percentage may be, upon the present value of our railroad properties, the surplus over and above which, being used in whole or in part for the benefit of the weaker lines.

POWERS OF THE STATES.

First, as to the power of the States: Our American plan of government contemplates a strong national, central authority with local self-government. This dual system has been tried out for more than a century. It has such valuable features that it is being copied by many of the other great nations of the earth. It makes it possible for the Government to keep in close touch with the needs of the people.

Prior to the war this system was given a severe test when applied to industries engaged in interstate commerce. After a long period of litigation the Supreme Court finally established a doctrine, enunciated in the Shreveport and Minnesota rate cases, where it was held that in case no unjust discrimination was created, the Federal tribunal could not overthrow rates established by State authority.

At the close of the war you were urgently asked to make certain modifications in the language of the statute as it then existed. We earnestly urged upon you the wisdom of declining to change that language. We felt and we stated to you that any change, innocent and harmless though it may appear, would inevitably be interpreted by others so as to throw the whole matter back into the hands of the courts for another long period of litigation. What was suggested at that time has occurred. We find the Federal authority very naturally has encroached upon the powers of the States, in some instances practically killing off all jurisdiction of any State commission. If it is wise to destroy this dual system of our Government as to our railroads, is it not also wise to pursue the same policy as to all other lines of business? If that be correct, shall we abandon this dual system of government which was set up by our fathers? The issue is basic, fundamental, and far-reaching. We earnestly petition you to eliminate from the transportation act all changes which have been made affecting the relative powers of the State and Federal tribunals, restore the

conditions as they existed before the war. If you will do this, the rules will be well established governing State regulation and Federal regulation of our common carriers as fixed in the statutes and as interpreted by a series of well-considered opinions of the court of last resort.

We believe the present effort of the railroads is practically to eliminate the State regulation of our common carriers. If that policy should be adopted as to our railroads, it is only a question of time until other forms of organized business will accomplish the same result.

The distinguishing feature of this form of government which was framed by our forefathers back in the eighteenth century is the Federal system, which combines a great central power with local self-government. One serves as a check against the other. The local government keeps in close touch with the needs of the people. The central power is able to compel peace at home and abroad. Both are essential. Combined they constitute the greatest achievement of the human race in the science of government. This must be preserved for future generations. A tendency toward too much centralization is just as dangerous as a tendency toward too much decentralization. We appeal to this great committee to do all that you can in reason and justice to preserve intact the powers of the States.

The fact that our Supreme Court has been careful to avoid similar encroachments upon the jurisdiction of the State courts has served as a stabilizing influence on our whole American system of government, and it has caused that tribunal to take rank amongst the greatest on earth. May its action serve as a precedent, a guide, to this Congress at such a time as this, when a similar issue is presented for your consideration.

As illustrating what has occurred since the change, I want to cite a case involving the rates in Illinois. You have heard, I understand, from the several State commissioners and from the general counsel of the National Association of State Commissioners. I do not know that anything I could add to this already able presentation would be enlightening. But let me present just one example will suffice.

In the Illinois case, in Docket 11703, there was involved the question whether the State rates in Illinois should be raised to the same level of the interstate rates. Illinois is a buffer State—some folks call it a bastard State. Some traffic is in the eastern territory, some is in the western territory, some in the southern territory. Now, the question is what the rate of advance should be; whether it should be the 40 per cent advance allowed in the eastern territory; whether the 35 per cent allowed in the western territory; whether it should be the 25 per cent allowed in the southern territory, or the 33⅓ per cent allowed on interterritorial business. Taking an average of all those figures, it would be 33⅓ per cent. Considering all the factors, the Illinois commission adopted a 35 per cent advance.

This came up before the Interstate Commerce Commission.

The only evidence offered as to any rate on grain was as to the rate by the Cairo gateway, and the same issues were presented as had been previously presented to the commission in the case of the Memphis Merchants' Exchange et al. *v.* the Illinois Central Railroad Co. et al., in the 43 I. C. C., 378. The commission previously said that a mere disparity in rates was not sufficient to set aside the State rates. In this case, however, they proceeded to set aside the State rates.

As to grain, the carriers showed the same situation which they had previously presented in the Memphis Merchants' Exchange case, and the carriers stated in their brief in the Illinois case the following:

"The present situation, which creates a disparity between the grain rates interstate and the grain rates intrastate, leads to practical difficulties which are explained by Mr. Cameron in this record. He there shows that, if grain moves to Cairo, is placed in an elevator, and is subsequently reshipped to an interstate destination, as for instance, to a point south of the Ohio River, on the local rate from Cairo, the total charge would be one-half cent less than if the movement was through Cairo on a combination of interstate rates with out the grain being stopped in transit. In other words, we have here a recurrence of the situation brought to the attention of the commission in Memphis Merchants' Exchange et al *v.* Illinois Central Railroad Co. et al, 43 I. C. C. 378."

Counsel for the carriers, in a colloquy with Judge S. H. Cowan, counsel for the shippers, stated as to livestock:

"Mr. FLETCHER. We are not trying the live-stock rates, Mr. Commissioner. We are just showing how the rate level exists to-day, and using this to show the difference between the State and interstate rates. That is all."

In the same case the Illinois rates on petroleum and petroleum products were involved, and there was not in the entire record one word, not one fact introduced as to the rates being unjust or discriminatory on petroleum. Nevertheless the state petroleum rates were wiped out by the Interstate Commerce Commission.

In a previous case which was before the commission. the commission said:

"It is proposed to cancel commodity rates on petroleum oil and its products, in carloads, between points in Illinois, and to apply 90 per cent of fifth-class rates under the Disque scale and the official classification in effect May 25, 1918, plus 4.5 cents per 100 pounds under general order No. 28, subject to the present fifth-class rates as maxima.

"Although its rates on petroleum and its products in the Illinois district are on a lower level than in central territory, no actual undue prejudice against refiners or shippers in Indians is shown; nor are the rates in the Illinois district shown to be unduly low or to burden other traffic. The conpetition which Illinois refineries have to meet is from the mid-continent field, principally in Oklahoma, and if the rates were made on the proposed bases, the relative adjustment would be disrupted."

And that was the occasion for the commission to decline to make the advance. In the latter case, the docket number that I just referred to, they disregarded that precedent and advanced the rates, without any evidence as to traffic conditions or rates before them on that particular commodity.

Now, I am conscious of the fact that the chairman of this committee, in reporting the bill to Congress, said, the committee had attempted simply to express the principles announced in the decisions of the Supreme Court of the United States. "We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in cases to which I have referred."

But the commission, in passing on that, made the following observation, when it was urged by counsel:

"Legislatures do not enact laws for the purpose of construing a previous act, unless a construction has been placed upon the prior act which was not intended by the legislature. There is certainly nothing in paragraph 4, section 13, which indicates any purpose of construing section 3 of the act."

That was in the Illinois case.

Now it seems to me the safest course is to restore the language as it existed prior to the war. There you have a long series of cases clearly outlining the basic principles which should control in the relative functions of the State and Federal tribunals, crystalized in the Minnesota and Shreveport cases. I have heard numerous proposed changes other than that suggested, but it seems to me that would be the safest course. But if any change in language is made, it should be in the other direction, to protect the powers of the State from the encroachment of the Federal Government. This thought might be carried into effect somewhat as follows: In case of conflict between State and interstate tribunals as to the reasonableness of rates creating an unjust discrimination and two sets of rates established, is it not within the power of the court to determine the just and reasonable rate? I know the court can not fix rates for the future, but can not the court pass upon the reasonableness of rates already established?

This thought was one that prevailed in the conferences of the National Association of Railway Commissioners while I was still a member of that organization, and was expressed twice in resolutions adopted by the association, not unanimously, but by divided vote.

SECTION 15A.

As to the second proposition, section 15-a, there can be no doubt but what the existence of section 15-a on the statute books has greatly retarded the readjustment of railroad rates in conformity with the reductions in prices which have been effected in practically all other lines of industry. The proviso at the end of paragraph (2) in that section may warrant reductions on a few commodities, but many have a grave doubt whether the commission has authority to make general reductions unless the railroads are earning their statutory rate of return. We should have this doubt removed by an immediate repeal of this section.

Section 15-a attempts to require the Interstate Commerce Commission to fix rates which will produce 5½ or 6 per cent upon the present value of our railroad properites until March 1, 1922, after which the commission itself is called upon to determine what that percentage shall be.

We believe that any statutory enactment which attempts by fiat of government to authorize or require charges in any industry of such a character as to yield a definite rate of return above all operating expenses and taxes is fundamentally uneconomic and unsound. There is an ebb and flow in all business. By that provision which you gentle men enacted last year you attempted to defy the forces of society which have been thousands of years in developing, and your effort has been a failure. It simply can not be done. Such an act of Congress serves simply to confuse and befuddle the situation. You might just as well attempt to pass a law that it shall not rain

during the next 30 days, or that the temperature shall not go below the freezing point this coming winter. It can't be done.

Every industry should be permitted during prosperous times to levy such charges upon the public that it can lay up a surplus to tide it over lean years and through a crisis or an emergency in business. That is precisely what the Interstate Commerce Commission has attempted to do during the past 30 years of railroad regulation. The last official reports of the commission, compiled from the sworn reports of the railroads themselves, show that American railroads have a total accumulated surplus of more than $1,800,000,000. And further that they added to their surplus last year alone above all operating expenses and above all taxes, and all interest and dividends that were declared, the tidy sum of $129,000,000. During the 30 years of Federal and State regulation of our common carriers there was a steady, constant improvement in their physical and financial conditions. We have built up the greatest railroad system on earth. The railroads in the country as a whole were earning in 1917 practically double the amount per mile of line which they did back in 1890 when the Interstate Commerce Commission was commencing its labors. The railroads as a whole in the United States in 1917 were earning a rate of return on their capital stock outstanding almost double that which they earned when regulation by this Government commenced. During that 30 years the net income of American railroads, above all operating expenses and above all taxes, had trebled in amount. In 1917 American railroads were earning a rate of return upon all the capital outstanding in the hands of the public almost double the average earned in England. Our Supreme Court has declared that in case of conflict between the State and Interstate Commerce Commissions, the findings of the Federal tribunal must prevail, if any unjust discrimination was created against interstate commerce.

The principles controlling the regulation of our carriers had been gradually evolved through a long series of careful opinions rendered by the Interstate Commerce Commission and by our courts. The railroads, somewhat impatient with not being able to get all they wanted, undertook at the beginning of the war, and again at the close, to make some radical changes. We believe they were fundamentally in error and we now earnestly urge a restoration of the law to substantially the same condition in which it existed before this upheaval occurred in government and in industry, growing out of the World War.

"Back to normalcy" should apply to Congress as well as to business.

I think that is all, gentlemen. I have brought with me a volume of statistical matter substantiating each of the propositions there made. If there is any question about any of them, I should be very glad to answer, but I do not believe I will burden you with this data.

I have some charts and things, showing the prostrate condition of industry; how practically every other line of business has reduced its charges during the past year. In one year the index numbers compiled by the Bureau of Labor Statistics, having been forced down 100 points, while the slight reductions in rates that have been made, relatively small in amount, have not compelled any substantial change, except an increase——

Senator LA FOLLETTE (interposing). Mr. Chairman, I ask that that material be incorporated in the record; that it be printed, whether Mr. Thorne is able to take the time to cover it orally or not.

Mr. THORNE. I have one thing here which I desire to call to the attention of the committee, especially. I believe it is about five minutes before you will be obliged to go, and I have one or two things that I might show you in support of a repeal of that section 15-a.

I want to read a letter addressed to Mr. Thom, written by Hon. Charles E. Hughes, which letter was made a matter of record before the House committee, in which it was held to be unconstitutional to appropriate a part of the excessive rate charged by railroads to build up a poor railroad in another community than that which the railroad in question served.

The CHAIRMAN. That is Judge Hughes's opinion?

Mr. THORNE. Yes, sir.

The CHAIRMAN. That may be read into the record.

Mr. THORNE (reading):

CONSTITUTIONALITY OF THE PROPOSAL IN SENATE BILL 2906 (SIXTY-SIXTH CONGRESS, FIRST SESSION) TO TAKE FROM A CARRIER A PART OF ITS EARNINGS ON LAWFUL RATES.

OPINION OF CHARLES EVANS HUGHES.

NEW YORK, *September 19, 1919.*

ALFRED P. THOM, Esq.,
General Counsel of the Association of Railway Executives,
Washington, D. C.

DEAR SIR: In reply to your request for my opinion as to the constitutionality of the provision in section 6 of Senate bill 2906 (Sixty-sixth Congress, first session) entitled "A bill further to regulate commerce among the States," etc., relating to the disposition of the described "excess" earnings of carriers, I beg to say:

Section 6 is as follows:

"In dividing the country into districts and the carriers into rate-making groups the commission shall have in view the similarity of transportation and traffic conditions therein. Rates of transportation shall at all times be just and reasonable. In changing or modifying them from time to time in the manner provided in the act to regulate commerce, as amended, and in viewing them from the standpoint of their effect in producing revenue in any rate-making group as a whole, the commission shall take into consideration the interests of the public, the shippers, the wages of labor, the cost of maintenance and operation (including taxes), a fair return upon the value of the property, in the group and used for or held for the service of transportation, the requirements for additional capital in order to enable the carriers to adequately perform their duties to the public and the conditions under which the same can be secured; and, for the purposes aforesaid, the commission shall from time to time determine the value of the property in each district and so lower or advance the rates of transportation, as nearly as may be, to provide said fair return as herein provided.

"If any carrier shall receive from operation in any year more than a fair return, to be determined by the commission, upon the value of its property, held or used for service in transportation, which may include a just allowance to provide reasonably for future years in which there may be insufficient earnings, the excess above such fair return shall be paid to the board within the first four months of the succeeding year, to be invested or expended for the following purposes, namely: One-half of all such payments to the board shall be invested or expended for the purposes set forth in section 25 hereof, and one-half thereof shall be deposited in a fund which, from time to time, shall be expended by the board in the purchase of equipment to be leased under proper terms to carriers in order to facilitate transportation, or to loan to carriers upon reasonable security in order to purchase equipment or other facilities in the event that such carriers are unable to secure elsewhere the funds with which to provide themselves with adequate transportation facilities. In no event shall surplus earnings in excess of the amount sufficient to pay a fair dividend, whether represented in reserves or otherwise invested in the property of the carrier, be capitalized or used in any way as a basis for increased rates.

"In applying the foregoing rule a comprehensive view of the rate-making group shall be taken and the level of rates, fares, and charges shall be determined with reasonable reference to average conditions therein."

I assume that it is the intent of the provision as to the payment by a carrier of "excess" earnings to the railway transportation board that the one-half, which is to be put by that board in to the employees' welfare fund, is to be used under section 25 of the bill for the benefit of railway employees generally and not separately for the benefit of the employees of the particular carrier paying the "excess;" and that the other one-half of the "excess" earnings which is to be used otherwise by the board may be used in the purchase of equipment to be leased, on in the making of loans, to carriers other than the carrier making the payment. In short, it is the essence of the provision that the so-called "excess" earnings of a carrier may be required to be paid to a Government agency for the purpose of being used by that agency not only for the general benefit of railway employees, but for the benefit of other carriers.

It should be observed that this requirement is not made as a condition for the exercise of any franchise granted to the carrier by the Federal Government. It is to be considered in its application to carriers chartered by the States and entitled to engage in interstate commerce on compliance with such regulations as Congress may constitutionally prescribe. Under the doctrine of the recent decision in Hammer v. Dagenhart (247 U. S., 251), the right to engage in the business of transporting passengers, or of ordinary and wholesome commodities, between the States while subject to appropriate regulation, may not be deemed to be subject to the absolute prohibi-

tion of Congress, and hence is not to be regarded as a privilege to be granted on any terms Congress may see fit to impose.

Nor is the requirement with respect to "excess" earnings imposed as a condition of the enjoyment of any guaranty as to earnings which has been given by the Federal Government and accepted by the carrier, thus constituting a contract governing the carrier's operations. The carrier still must take its risk of losses. If it be said in a general sense that the provisions as to rates constitute a guaranty of proper and adequate rates, this is no more than the promise of the reasonable exercise of the power of regulation. There is no benefit conferred upon the carriers under the bill which can be regarded as justifying an exaction which otherwise could not be enforced.

Further, the requirement as to the payment of "excess" earnings does not purport to be imposed under the taxing power, and in my judgment could not in its present form be sustained as a valid tax independently of the power of regulation. It would seem to be clear that the consitutional authorities which would be invoked in the enactment of this legislation would be solely the power of Congress to regulate interstate commerce.

The general principles governing the constitutional authority of Congress to regulate interstate commerce are not open to dispute. It is a power to foster, to protect, to conserve; to prescribe the rules by which interstate commerce shall be governed. It unquestionably embraces a broad authority to deal with all phases of transportation in interstate commerce and to govern the instrumentalities of that commerce, including the relation of carriers and their employees, as illustrated by the hours of service act, the employers' liability act, and the Adamson Act as to hours and wages (Baltimore & Ohio R. R. Co. *v.* Interstate Commerce, 221 U. S. 612; Second Employers' Liability Cases, 223, U. S. 1; Wilson *v.* New, 243 U. S 332). It is also well settled that the exercise of the power may be in the nature of police regulations (Lottery Case, 188 U. S. 321; Hipolite Egg Co. *v.* United States, 220 U. S. 45; Caminetti *v.* United States, 242 U. S. 470). But, in the most extreme applications and under the broadest definitions of this Federal power it has been recognized that it is not an unqualified or arbitrary power. It must be exercised subject to the limitations of the fifth amendment of the Federal Constitution prohibiting the deprivation of any person of liberty or property without due process of law. (Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336; Clark Distilling Co. *v.* Western Maryland Railway Co., 242 U. S. 331, 332; United States *v.* Cress, 243 U. S. 316, 326.)

The broad legislative discretion of Congress with respect to rates of transportation is thus subject to the limitation that the rates shall not be made so low as to be confiscatory (Wilson *v.* New, 243 U. S. 332, 349, and cases there cited). And aside from the imposition of confiscatory rates, the power to regulate does not justify the assertion of arbitrary control, however excellent the motive, that is, an exercise of power not appropriate to the subject (Adair *v.* United States, 208 U. S. 161, 178, 180; Interstate Commerce Commission *v.* Chicago G. W. Railway Co., 209 U. S. 108, 118; Southern Pacific Co. *v.* Interstate Commerce Commission, 219 U. S. 433, 444; Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, 91; Hammer *v.* Dagenhart, 243 U. S. 251, 270, 276; Wilson *v.* New, 243 U. S. 332, 346). As was said in Eilson *v.* New (243 U. S. 332, 346, 353), "It is equally certain that where a particular subject is within such authority, the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation."

Having these general considerations in mind, the validity of the provision of the pending bill as to the disposition of the so-called "excess" earnings may be considered in the following aspects:

First. On the assumption that the rates as fixed by the commission under which the "excess" earnings have been realized, are just and reasonable rates. It is to be borne in mind that rates fixed by competent legislative authority which are not found to be confiscatory, are presumed to be just and reasonable, and that the courts do not interfere with the exercise of the legislative discretion, whether it be exercised directly by Congress or through its subordinate agancey in accordance with the standards which Congress fixes. (Minnesota Rate Cases, 230 U. S. 352, 433; Wilson *v.* New, 243 U. S. 332, 349).

Section 6 of the bill provides: "Rates of transportation shall at all times be just and reasonable." It is provided in section 1 of the bill that rates, fares, and charges in force at the time of the repeal of the Federal control act of March 21, 1918, shall remain in force until changed by competent authority. It further provided in section 5 of the bill that schedules of rates, fares, and charges filed with the commission in accordance with the act to regulate commerce within 30 days after Federal control ceases shall become effective at the end of four months after they are so filed with such modifications as may be ordered by the commission and the commission is required

within that time to determine whether they shall be modified "in order to make them fair, just, and reasonable rates for the service to be performed." It is further provided in section 44 of the pending bill, amending section 15 of the act to regulate commerce, that whenever the commission after a hearing either on complaint or on its own initiative shall be of opinion that any individual or joint rate, fare, or charge whatsoever charged or collected by any carrier is or will be unjust or unreasonable the commission is authorized to determine what will be the just and reasonable individual or joint rate, fare, or charge to be thereafter observed, and the carrier is prohibited from making any charge which is in conflict with this determination. Thus all the rates fixed and maintained are at all times open to inquiry, and the commission has full authority to insist that the rates shall never be more than just and reasonable compensation for the services which the carrier renders. Nor does the bill interfere with the reparation proceedings which may be entertained on the application of persons aggrieved by extortionate charges.

Taking all the provisions of the bill into consideration, it would seem that the rates as fixed and permitted to be charged and collected by the carrier, assuming that the rates are not confiscatory, should be regarded as just and reasonable rates fixed and maintained by competent authority. It is also to be observed that section 6 of the bill, providing for the payment to the railway transportation board of the so-called "excess" earnings does not provide for a determination that the rates under which the described "excess" has been collected by the carrier were not just and reasonable rates for the services rendered.

If, however, the rates thus fixed, charged, and received by a carrier are to be deemed just and reasonable for the services rendered, the carrier is entitled to these receipts as its property, and the taking by the Government of any portion of these receipts (except under a valid tax) for general governmental purposes or for the benefit of other carriers would appear to be a taking of property contrary to the fifth amendment of the Federal Constitution.

Of course, a carrier may be required to render the service involved in its undertaking as a carrier. It may be required to spend whatever money is necessary to make such service prompt and adequate. Its conduct, in the performance of that service, may be regulated with respect to facilities for transportation, the hours of service of employees, standards of wages, liabilities for injuries, the health and comfort and safety of all persons concerned in the transportation, and the receipt, handling, and delivering of commodities transported, but the requirement of the use of money for the manifold purposes which may be embraced in proper regulation, and the protection and conservation of interstate commerce with respect to the carrier, are in connection with the performance of the carrier's service. In the present case it must be assumed that the carrier has met all its responsibilities under the law, has given all the required facilities, has observed all regulations as to transportation, employees, passengers, and goods, and has charged the just and reasonable rates established by law, and that the earnings that it has left are the proceeds of its reasonable contracts made in conformity with law.

I do not think that the provision of section 6 as to "excess" earnings can be sustained under the principle of the case of Charlotte, Columbia & Augusta R. Co. *v.* Gibbes (142 U. S., 386), and other similar cases, as to the placing of the expenses of governmental supervision upon the corporations supervised, or under the doctrine of the case of Noble State Bank *v.* Haskell (219 U. S., 104), relating to an assessment under State law upon State banks for a depositors' guaranty fund, or of the case of Mountain Timber Co. *v.* Washington (243 U. S., 219) with respect to required contribution for a workman's compensation fund in order to provide compensation for injuries resulting from the hazards of the business. The provision in the pending bill does not relate to the expenses of supervision. It is not an imposition in the nature of an occupation tax or a license tax. The assessment in the Noble State Bank case has been described by the Supreme Court of the United States as being in the nature of an occupation tax upon all banks existing under the laws of the State. (See 243 U. S., p. 245.) In the Mountain Timber case the contributions for the workmen's compensation fund were required under the general police power of the State and these contributions were levied upon all employers in the described hazardous occupations according to percentages fixed in proportion to the hazards of each group. The provision of the pending bill is not a tax laid upon all carriers with respect either to gross receipts, or net receipts, or any other basis for the assessment of a tax, but is simply a requirement of the payment to the Government board of the "excess" earnings of a carrier which the Interstate Commerce Commission determines to be more than a "fair return" upon the value of its property. Such an exaction goes beyond the limits of any decision known to me, and if the rates under which the so-called "excess" earnings are collected by the carrier are to be deemed to be just and reasonable rates, fixed

and maintained as such under the authority of law, I am unable to escape the conclusion that the requirement as to the payment of the so-called "excess" earnings of a carrier exceeds the constitutional authority of Congress as applied to carriers not transacting their business under a Federal franchise or contract imposing such a condition.

Second. It will doubtless be insisted, however, that the provision in question should be viewed in another aspect. It may be said that the rates under which the so-called "excess" earnings have been obtained are not to be deemed just and reasonable rates, and while they were charged and collected as such under authority of law, that the fixing of the rates as just and reasonable is only tentative.

The argument will undoubtedly be that the bill requires the division of the country into districts and the carriers into "rate-making groups," and that section 6 requires the commission to take a comprehensive view of the rate-making group and that the level of rates is to be determined with reasonable reference to average conditions. In viewing rates from the standpoint of their effect in producing revenue in any rate-making group as a whole, the commission is directed to take into consideration the interest of the public, the shippers, the wages of labor, the cost of maintenance and operation (including taxes), a fair return upon the value of the property in the group, and the requirements for additional capital in order to enable the carriers adequately to perform their duties to the public. Hence, it will be said that the rates fixed or maintained as just and reasonable for the services in question are fixed with reference to a group of carriers, and that so far as any particular carrier is concerned the finding as to the reasonableness of the rates charged by that carrier must be deemed to be merely a tentative finding. It will thus be contended that what is meant by the provision as to the payment to the Government board of "excess" earnings is that no carrier shall be allowed to receive for its services more than what is subsequently determined by the commission to be a "fair return" upon the value of its property held or used for the service; that all rates allowed are subject in the case of each carrier to this ultimate determination, and that to the extent that the rates produce the "excess" earnings they are to be deemed to be unreasonable. In this view it will be urged that no carrier is to be regarded as deprived of earnings from reasonable rates, but only of the "excess" earnings under the rule of limitation; and that, further, as the amount which the particular carrier is permitted to retain is determined to be a fair return upon the value of its property, it can not be said that there is an abuse of the regulatory power of Congress.

This argument encounters serious objection:

(1) It apparently takes no account of the fact that the individual rates charged by the carrier or the joint rates charged by the carrier in connection with other carriers may have been separately determined, either upon complaint or upon the commission's initiative, to be just and reasonable rates for the services which the particular carrier renders. The provision as to the payment of "excess" earnings appears to apply in every case where "any carrier shall receive from operation in any year more than a fair return, to be determined by the commission, upon the value of its property," even though the particular rates charged have been sustained, upon hearing, as just and reasonable.

It is difficult to understand upon what theory of proper regulation such rates are to be deemed to be unreasonable without any further inquiry as to the conditions of the service or as to matters directly relating to the rates themselves, but solely upon an inquiry with respect to the value of the carrier's property and the amount of the total net earnings derived by the carrier from its operations. The latter may be a legitimate inquiry for a court in determining whether a legislative body or its subordinate agency has transcended its authority in fixing a body of rates so low as to be confiscatory. But it is a different thing thus to conclude that rates which are not confiscatory and which as individual or joint rates have been expressly found in the case of the particular carriers to be just and reasonable for the services rendered were, in fact, not reasonable rates.

(2) Moreover, whether the rates which have produced the so-called excess earnings of the carrier have or have not been sustained in proceedings under section 15 of the act to regulate commerce, as amended, with respect to the individual and joint rates of the particular carrier, the fact remains that the rates charged and collected have been fixed and maintained as just and reasonable rates, and that the bill does not require as a necessary preliminary to the required payment of the "excess" that there should be a finding that the rates were in fact unreasonable rates. The only finding required is that a particular carrier has earned more than the amount which the commission determines to be a "fair return" upon the value of its property held or used for the service.

The argument in support of the provision seems to assume that Congress, under the guise of regulating rates, either directly or through the commission, can abandon the fixing of what are reasonable rates for the services rendered by the carrier, and, without any determination that the particular rates or the tariff schedule of a carrier are unreasonable, take the earnings of a carrier simply upon a determination that the carrier has received an "excess" over a "fair return" upon the value of its property.

This would appear to be not a regulation of rates, or of service, but of earnings. I do not understand that it is within the authority conferred upon Congress to regulate interstate commerce to determine how much a carrier not exercising a Federal franchise, or operating under a Federal contract, shall earn in interstate commerce, assuming that the carrier discharges all the public obligations incident to its service and charges reasonable rates. In my view the regulation of such a carrier must have direct relation to the services it renders, and if the question is of the amount of money it should receive for its service, to the reasonableness of its charges.

(3) Again, if the assumption could be indulged that the finding that a carrier has received more than a "fair return," is to be regarded as tantamount to a finding that the rates which produce the "excess" earnings are unreasonable rates, and that such a finding without an inquiry with respect to the rates themselves, but only as to earnings, could be sustained, there would be a further difficulty.

I lay on one side the question of the propriety of treating rates as being reasonable as to one carrier and as being unreasonable as to another carrier with respect to substantially the same services under similar conditions.

Assuming that it is the intent of the provision that the rates producing the "excess" earnings in the case of a particular carrier are to be deemed to be unreasonable as to that carrier, there is manifestly a question beyond that of the right of that carrier to complain. As I have said, the provision applies to "excess" earnings received under rates, although these may have been sustained as just and reasonable after full hearing in proceedings instituted on the complaint of shippers or on the initiative of the commission itself. The rates as originally fixed may have been sustained and shippers denied reparation. Or the rates as originally fixed may have been modified and the rights of shippers to reparation determined accordingly. Still, notwithstanding the rates are finally fixed and enforced as against shippers, the provision assumes the right to take the "excess" earnings obtained under such established rates on the theory that such rates are to be deemed unreasonable, manifestly, in such case, the question of the validity of such a provision in the exercise of the regulating power is not exhausted by the mere consideration of what amounts to confiscation of the carrier's property.

Unreasonable rates constitute an unjust exaction from shippers or passengers. The rates maintained by Congress, or under its authority, in the exercise of its power of regulation of interstate commerce, are lawful because deemed to be reasonable, a presumption which the courts entertain so long as the rates lie within the range of legislative discretion. But if we proceed on the assumption that the rates which are actually charged are extortionate it would appear to be an abuse of the regulating power of Congress to enforce them. Congress, it may be said, could not, under the guise of regulating interstate commerce, compel shippers or passengers to pay confessedly extortionate charges for the services rendered. On the hypothesis that the charges are unreasonable, the power to authorize them, no less than the power to collect them, falls. The exaction and maintenance of such charges would deprive shippers and passengers of their property without due process of law.

But it may be said that the rates which produce the "excess" earnings are to be regarded as unreasonable only with respect to the carrier, under the rule limiting its aggregate earnings, but that at the same time the rates maintained with respect to the persons paying the rates are to be regarded as reasonable as to such persons, and that the reasonableness of the rates with respect to shippers or passengers, although the rates are deemed to be unreasonable with respect to the carrier, may be sustained because they are based on average conditions and because of the use of the "excess" earnings for the benefit of shippers or passengers generally in aiding weak systems of transportation which are public utilities.

I regard this as a fallacy. I do not understand that rates charged by a carrier for the services it renders can properly be regarded as reasonable with respect to the carrier and at the same time as reasonable with respect to those who pay the rates. The question of the reasonableness of the rates is essentially a question whether the charge made by the carrier and paid by the shipper or passenger for the service rendered is a charge which the shipper or passenger should pay to the carrier and the carrier should receive for that service. If it is established that the rate is a reasonable one for a shipper or passenger to pay, it is the carrier that renders the service for which the rate is to be paid, and it is proper that the carrier lawfully performing the service

and furnishing all the required facilities therefor should receive and enjoy the proceeds at the rate thus charged. An attempt to divest the carrier of any portion of its earnings thus obtained, on the theory that the charges which it was reasonable for shippers and passengers to pay for its services it was unreasonable for the carrier to receive and retain, would, in my judgment, be outside the scope of appropriate and valid regulation. The mere fact that it is proposed to devote the moneys or property of a carrier or of any other person to good uses can not be regarded as justifying the deprivation of the carrier or such person of the right to enjoy and retain his own property, except as it may be taken for proper governmental purposes through valid taxation or for public use on the payment of just compensation.

For the reasons stated, I am constrained to the conclusion that the provision in section 6 of the pending bill as to the payment of "excess" earnings, in its application to carriers not operating under a Federal franchise or contract permitting the imposition of such a condition, violates the Federal Constitution.

I remain, very respectfully, yours,

CHARLES E. HUGHES.

Senator FRELINGHUYSEN. That is a matter of record, is it not, before the other committee?

Mr. THORNE. Before the House committee, yes. I do not believe it was before the Senate committee heretofore.

I have here a chart graphically portraying the prices of farm products in comparison with railroad rates during the past 11 years. It is a very striking fact which is illustrated by this chart, gentlemen, if I could just have your attention for a moment.

The CHAIRMAN. You may proceed.

Mr. THORNE. The particular condition that will inure to the benefit and prosperity of the community is that there shall be an equilibrium in prices and rates; that there shall be common movement up or down. That situation is very graphically shown on this chart, how steady the relationship was between rates and farm prices from 1910 to 1915, inclusive [pointing to a chart]. Then came the war, and since then conditions have been chaotic. Farm prices went up at a very rapid rate, as shown by the broken line on this chart. Railroad rates went up at a slower movement, or increasing rate of progression, until 1921, and then they reached the peak. The highest level during the past 40 years was reached then.

The CHAIRMAN. You mean the rates on farm prices?

Mr. THORNE. No; the revenues of the roads——

The CHAIRMAN (interposing). On farm prices?

Mr. THORNE. No; the average revenues per ton-mile, I am speaking of now, Mr. Chairman. I just spoke of the farm prices. They reached their highest level in the last 40 years, and there they remained. Farm prices came down. They are now practically a little above the prewar level. Railroad rates are on the highest level in their history. There they have stayed.

Now, this wide margin between farm prices and railroad rates does not tell the whole story as it existed during the war. During that period you gave the railroads the equivalent of a Government bond—an absolute guaranty of return—when other people were forced to take the hazards of war, and of increasing labor costs and supply costs. Many businesses were ruined. Others profiteered. During that tempestuous period of change and upheaval you said to the railroads, "We will take the most prosperous three years in your entire history, and we will guarantee you that net, regardless of how high labor costs and supply costs may go—whatever happens, we guarantee you this return."

Aside from that, gentlemen, you gave them, in addition to this rate indicated by this line, a billion dollars practically—I think it will exceed that when all of the sums are paid—of additional funds over and above the rates received. And that was not gross; that was net.

Now, after the period of war closed, when the guaranty was thought by some to be excessive, a law was put on the statute books that forced the commission, when prices were at their very peak, to make a guess as to the value of railroads. And they guessed it high, we think. You forced them to make a guess as to the value of the railroads, and then you made a rate of return on that which was higher than the rate guaranteed during the war, which was previously held to be excessive. The rate then was approximately 5.21; you assured them 5½ to 6 per cent, at a time when every other industry was forced by society to reduce its charges; you said to the railroads, "You may increase your charges over and above this guaranty," and the amount so permitted was something like $1,500,000,000, as interpreted by the Interstate Commerce Commission. You are not responsible, of course, for the findings of the Interstate Commerce Commission

Senator FRELINGHUYSEN. Have you a chart there showing the increase of wages prior to this time?

Mr. THORNE. No; but the increase in wages could not affect the amount, when you guaranteed a net return during the war.

Senator FRELINGHUYSEN. But have you a chart showing the increase in wages?

Mr. THORNE. I have not.

To show the effect of the guaranty during the last year, I have a statement issued by the Association of Railway Executives, in November, 1920, in which they say——

The CHAIRMAN (interposing). I do not like to interrupt, Mr. Thorne, but the committee shall have to suspend now.

Senator LA FOLLETTE. I suggest, Mr. Chairman, that we suspend long enough to go down and answer the roll call and then come back and let Mr. Thorne finish his statement, unless he can come back to-morrow morning.

Mr. THORNE. I have an argument to make before the Interstate Commerce Commission to-morrow morning at 10 o'clock, but I should be very pleased to be here before that time, if the committee can meet earlier.

Senator FRELINGHUYSEN. It will not take very long for him to complete his statement, perhaps a half hour, and I think we should hear him to-day.

The CHAIRMAN. I think we had better meet to-morrow morning at 9 o'clock.

(Whereupon, at 10 o'clock a. m., the committee adjourned to meet on Tuesday, November 8, 1921, at 9 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

TUESDAY, NOVEMBER 8, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. Mr. Thorne, you may proceed.

STATEMENT OF MR. CLIFFORD THORNE—Continued.

Mr. THORNE. Yesterday I endeavored to outline concisely the position that my associates and myself have taken on these two important issues of the restoration of the powers of the States and the elimination of Section 15-a. The principal theme of my statement was that the law as it existed prior to the transportation act of 1920, as to those features, was adequate.

At the close of the hearing yesterday morning I was outlining the facts in support of the proposition that the transportation act in effect caused an increase in net revenues to the carriers over and above the Government guarantee in existence during the war period, which was in itself excessive. I was reading from a statement of the Association of Railway Executives covering the first month in which the transportation act, so far as 15-a, was effective. The order of the Interstate Commerce Commission became effective August 26, 1920. It was an attempt to follow the mandate of Congress under section 15-a, and for the first month under the operation of railroads following that decision we find the facts as outlined by the railway executives, as follows:

"A compilation completed to-day by the Bureau of Railway Economics shows that the net operating income for September of the class 1 railroads of the country fell approximately $29,343,000, or 26.9 per cent short of the amount expected to be earned under the increased rates fixed by the Interstate Commerce Commission, in accordance with the transportation act. The figure is based on reports from 207 railroads of that class having a total mileage of 237,899 miles.

"The net railway operating income for the roads for September totaled $79,876,655, a gain of only 2.8 per cent over that for the same month in 1919 despite the increased rates. It was also only approximately $4,800,000 above the standard return which the railroads would have received had they still been operating under the guaranty provided for them in the transportation act, but which ended on September 1."

In other words, under the first month's operations a net income of $4,800,000 greater than the standard return guaranteed during the war and extended to September 1, but 26.9 per cent below what the Interstate Commerce Commission said they were entitled to under the new law known as the transportation law of 1920. Four million eight hundred thousand dollars above the war guaranty, but 27 per cent below what they were entitled to under the new law.

One of the important factors in bringing about that unfortunate result at such a crucial time when all industry was trying to get back to prewar level was the appraisal of the properties. I do not believe that a discussion of that valuation is hardly pertinent to this particular discussion this morning. I have data which I think shows conclusively, and which can be presented at a later date, that that valuation is something like $2,000,000,000 greater than the par value of all the stocks and bonds of American railroads outstanding in the hands of the public, and almost $7,000,000,000 greater than their market value at the time the appraisal was guessed.

Senator LA FOLLETTE. I would be very glad to have you submit that data for the record, Mr. Thorne.

Mr. THORNE. If you desire it I should be pleased to do so, but I do not want to impose it on you if you think there is any question about it being pertinent.

Senator LA FOLLETTE. It seems to me it is pertinent, and I would be very glad to have you submit it.

Mr. THORNE. I will do so.

I undertook last year to arrive at the par value of all the securities outstanding in the hands of the public and this is the result of that computation. The latest figure available was for December 31, 1916, at which time the total par value was $16,332,578,328. Then I endeavored to get statements from the railroads as to the securities which had been issued subsequent to 1916. I obtained replies from the bulk of the railroads of the country, and at that time the total securities which had been issued since December 31, 1916, was $149,095,929, making a total of $16,481,674,257.

The CHAIRMAN. Did you add to that the $1,134,000,000 which the Government had expended on capital account?

Mr. THORNE. No; I am going to get to the proposition in just a moment. The $16,481,000,000 did not include $50,000,000 which was later reported to me as an approximate statement by the Pennsylvania. And it did not include approximately $400,000,000 which the director general stated to me was the amount unfunded owing by the railroads to the Government.

The CHAIRMAN. Well, that amount is about $400,000,000; I think it is a little bit less. But, according to the report of the director general, the Government during Federal control, from January 1, 1918, to March 1, 1920, expended $1,134,000,000 for additions and betterments which would have been ordinarily, I suppose, funded in some form or other by the railroads if they had been in possession of the properties.

Mr. THORNE. You must remember, Mr. Chairman, that a very substantial portion of that property constructed during the 26 months would have been built and should have been built out of surplus earnings. The amount funded by the issuance of securities I think is properly represented by the $400,000,000.

The CHAIRMAN. Well, the $400,000,000——

Mr. THORNE (interposing). Had not been funded.

The CHAIRMAN (continuing). As I take it, were the car trust equipment certificates which, shortly after the transportation act was passed, were funded. They consisted of locomotives and cars which had been allocated to the various railroads, and my recollection is that that particular operation amounted to $375,000,000 in round numbers.

Mr. THORNE. Mr. Chairman, what is the amount that the railroads are asking the opportunity to have cared for at the present time by their refunding measure?

The CHAIRMAN. By what?

Mr. THORNE. By the refunding measure.

The CHAIRMAN. There is no refunding measure before the Congress, so far as I know. The transportation act gave to the President, in settling up the affairs of Federal control, the right and discretion to fund such portion of the $1,134,000,000 which had been expended for capital account during Federal control as he might think wise, and I do not recall just how much of that he has funded up to the present time in settlements that have been made, but the total amount which he might have funded under that act would have been the $1,134,000,000. But he has made settlements with various railroads. The account is here in the hands of the committee, but I do not recall the exact figures. And what he will fund in the future, as settlements are made, is, of course, an unknown factor. I suppose nobody knows how much he will fund.

Mr. THORNE. In order for any person to intelligently say how much money the railroads could have floated as securities you must not take the amount of money advanced to them as devoted to capital expenditure. First, funds advanced to them might be used for meeting maturing obligations. Second, capital expenditures can be taken care of out of surplus earnings as well as issuing stocks and bonds, and have constantly so been.

The CHAIRMAN. All that may be true, but I was simply speaking of what had been done. The railroads did not expend this money for themselves. There was no money advanced to them. The Government expended it upon the properties, and in settling up their affairs the President has the right to fund such portion of expenditures on that account as he may think best, as he may believe the requirements of the situation demand.

Mr. THORNE. Whether that $1,100,000,000 about which you spoke should be covered by the issuance of securities can not be determined by the amount of that $1,100,000,000, because, as I said previously, the expenditures of a very large amount are being constantly made by the carriers, and properly made, out of surplus earnings. As to the amount they have to meet by the issuance of securities is a problem. Some roads try to take care of all of their improvements and betterments out of surplus, practically,

The CHAIRMAN. Well, I am not arguing the matter with you.

Mr. THORNE. I am not either, Senator; I am just trying to state my proposition in regard to that $1,100,000,000.

Senator LA FOLLETTE. I hope you will state it fully.

Mr. THORNE. The Pennsylvania Railroad during that period that I made an analysis of, during a period of years—and it was not questioned by the Pennsylvania—spent over $200,000,000 out of earnings for betterments and improvements, and if I remember correctly something like $40,000,000 out of issuance of securities. In other words, the public, in addition to paying the rates for handling the traffic, built the property for the Pennsylvania, and then agreed to pay them a return on what they built.

That this should not be capitalized, this property that is built out of surplus, is a proposition that we have frequently previously discussed here. It seems very difficult to make that point go home, and yet, Mr. Willard, president of the Baltimore & Ohio Railroad, and chairman of the railway executives committee, in handling the 1910 Advance Rate case, and Mr. Ripley, a leading executive among the western roads, both admitted under oath on the witness stand that if they were allowed a reasonable return they would not expect nor ask for the capitalization of property built out of surplus earnings.

The CHAIRMAN. Well, I agree with you on that proposition entirely.

Mr. THORNE. And this property that has been build up out of earnings has now finally exceeded the par value of all securities outstanding. As to the issuance of those securities in the past, we know that large quantities of stock have been issued with little or no receipts in cash. Mr. Poor, I think it was, said in the 90's, that three-fourths of the capital stock of the companies was issued without receipt of any actual money into the treasury of the corporations, and Mr. Lovett is responsible for the statement as to the property investment account that in the past that has included the par value of securities, whether any funds are received out of the issuance or not.

I wish to read into the record a paragraph from Mr. Lovett, if I may.

Senator LA FOLLETTE. Certainly.

Mr. THORNE. I do not have the quotation right at hand, and I will furnish it for the record later.

The CHAIRMAN. Very well, you may do so.

(The quotation from Mr. Lovett, to be furnished by Mr. Thorne for the record, is as follows:)

"But if 'property investment' is to be taken as the guide, the more overcapitalized a railroad has been the greater would be its value, for, until the bookkeeping rule was changed by the commission in very recent years, all securities issued were carried in the property-investment account by most companies at par, regardless of the price received for them."

Mr. THORNE. Taking this figure, $16,400,000,000, that is represented in outstanding securities, and adding to it the $400,000,000 that represents the amount due the Government which has not been funded, brings the total up close to $17,000,000,000. I think that that should be increased by some amount which I can not state at the present time, representing subsequent issues of securities, but it would be relatively small in amount, because few securities have been issued. It should also be increased by the amount the railroads owe the Government, which will have to be covered by the issuance of new securities. But that $17,000,000,000 represented last year approximately the par value of all outstanding stocks and bonds, plus the $400,000,000 owed the Government, and it was not questioned during the hearing by counsel or witnesses for the carriers, before the Interstate Commerce Commission.

Then the task came to find out what was the market value of that sum of securities which were outstanding in the hands of the public. We made an analysis of all of the quotations of all of the railroad stocks and bonds quoted on the market during a representative period, arriving at a market value. We took all the stocks and bonds of class 1 carriers, as shown on the balance sheet of Poor's Manual of Railroads, covering returns for the year ended December 31, 1918, and these were the latest figures available, which were outstanding in the hands of the public. To this we applied in the case of stocks the mean of the high and low market price for the week ending May 14, 1920, and for bonds the weekly range for the same week, or the last sale made during the preceding six months, and for all stocks and bonds that were not actually on the New York Stock Exchange we took at par, which we think is more than liberal. In the aggregate we were able to find a basis on 80 per cent of the capital in the hands of the public. We found that the market value was approximately 72 per cent of the par value. A leading witness for the railroads during the trial of this case last year admitted on cross-examination that it was not over 75 per cent of the par, so that our estimate was not very far from his judgment—the only witness in fact that the railroads put on the witness stand in the case as to finance that I can recall.

The result of that computation can be summarized as follows: The par value as of last year was approximately $17,000,000,000. The market value was a little over $12,000,000,000. The appraisal made by the Interstate Commerce Commission was $18,900,000,000. In other words, almost $2,000,000,000 greater than the par value, and almost $7,000,000,000 greater than the then market value. It makes one almost tremble for the future of regulation of any organized business when he contemplates that result.

The CHAIRMAN. Mr. Thorne, do you regard the market value of public utility securities, where the Government has and exercises the right to determine the revenue and the right to determine from 40 to 50 per cent or more of the expenses, a fair criterion of the value of the property?

Mr. THORNE. I think that if you have rigid regulation of rates, keeping revenues down to a reasonable basis, that it would be reasoning in a circle to then say the market value is the valuation of the property upon which the returns may be computed. I think, though, that in view of the history of our regulation in this country, that under the revenues that have been permitted by our Government that we have been able to build the greatest railroad system on earth, that the credit of our railroads, as a class, has in practically every foot of the last 10 years been superior to any other industry in America, that they have been able to borrow money at a better rate than any other industry in America, which has been repeatedly conceded by leading railroad witnesses—and I can give you a dozen quotations in support of it—that in view of those facts the judgment or estimate of the investing public, as reflected in the market place, might be very, very significant in determining its fair value. It is one of the factors, I believe, the Supreme Court said should be considered. I think that the cost of reproduction new, less depreciation, is a factor. I think perhaps we are overplaying that factor at times. I think the original investment is a factor of very great significance.

The sacrifice of the investor, as expressed by the late Mr. Lane, is a very able way of expressing what perhaps might be the correct criterion or test. If you can give a return that the public is willing to risk its money upon, the public ought to be satisfied to get that return. It ought to be satisfied with a reasonable return on the money that it puts into the property.

The CHAIRMAN. Well, that is my view of it. But how far do you think that view has been overturned by the recent decisions of the Supreme Court of the United States?

Mr. THORNE. It seems that a great deal of weight has been given to the cost of reproduction new, less depreciation. Perhaps these other factors which have also been specified in the decisions and in the statutes to be considered have not been as competently presented as they should have been. I do not believe the Supreme Court has ever stated that the sacrifice of the investor is not a factor to be considered. The present value, if it be the cost of reproduction new, less depreciation, has been repudiated by the Supreme Court as to land, notwithstanding this act of Congress which requires the commission to find the cost of reproduction. Recently, however, when the Commission declined to consider the land multiple, that is the cost of acquiring the land to-day as applied to the entire system, the Supreme Court said that it would have to find that factor. The court did not say that it was necessary as a very weighty or important element or factor in arriving at the final value, but it said that was required by the act of Congress subsequent to the decision in the Minnesota Rate case, in which Mr. Justice Hughes very plainly stated that if the carriers received a return on the fair present value as estimated by the present value of adjoining land, they should be satisfied. However, Mr. Hughes did not say that they were entitled to that as a minimum. He said that they should be satisfied; that that was sufficient; and even allowing them that return, there was not a justification for overturning rates established by the Minnesota commission. In that decision he said that it is not necessary for the purpose of the case to consider the source of the property from which it came, although that issue was presented.

And in a former case, the Cumberland Telephone & Telegraph case, reported in 212 United States, when they were considering investments out of surplus earnings in a utility, the Supreme Court said it was not necessary for the purpose of that case to decide that issue. However, the court said investments made out of funds set aside for accrued depreciation should not be capitalized. If that should not be capitalized, why should we capitalize these investments out of surplus earnings? I think that we must in some way take care of that investment out of surplus earnings, or the first thing we know we are going to have some controlling precedents that will compel for all future generations a return on that property. It is up to you gentlemen on this committee, I think, to devise a method of protecting that issue, because present tendencies are toward the recognition of

that as a part of the property. Although the record to-day is still clean, and it can be taken care of, you have a unanimous opinion of the Interstate Commerce Commission in 1911, both eastern and the western cases, against allowing an increase in rates for the purpose of taking care of return on such property. You have the decision of the Supreme Court in which they reserve that for future consideration, both in the Cumberland case and the Minnesota case.

At the present time, in the appraisal being made by the Interstate Commerce Commission, I understand that there is absolutely no effort to make that separation. It seems to me that before it is too late we ought to undertake to take care of that issue.

Now, in regard to this property, unless you do take care of that we are going to be compelled to constantly pay these investors a reasonable return on what they put into the properties; then we are going to be compelled to pay additional funds for the purpose of creating a surplus to tide them over emergencies, and to build non-revenue-producing improvements, and then you are going to make us pay a return on what we do in that way. In other words, we pay these railroad stockholders and bondholders a reasonable return on their investment; we build their property for them, and then we pay a return on what we build. That is one reason why that property appraisal guessed last year is $2,000,000,000 greater than the par value of the securities, and $7,000,000,000 greater than the market value of their securities.

And another factor, of course, was that prices were excessive; they were on the highest peak of the generation, and Mr. Thom very, very ably and forcibly urged that they should be liberal in their estimates under such circumstances. And it was by the mandate of this Congress that that appraisal was forced at that time.

The situation to-day is very dangerous. If that appraisal is going to stand, if this commission has reached conclusions before they had actually appraised 2 per cent of the mileage in the United States—and that was not the final appraisal—if that is going to stand, there is a burden for all time to come that we must take care of that I wish could be corrected in some way.

I was trying to outline yesterday the facts why I believed the law was sufficient without these two changes made in the transportation laws of the country last year. One fact was that I thought the carriers were being taken care of satisfactorily under the principles and under the dual regulation existing prior to the war, and that we should like very much to see that situation restored.

The Government has undertaken an experiment in connection with the regulation of organized business. Our railroads to-day constitute a legalized monopoly. There is no other way of expressing it. You have specifically stated in the transportation act that consolidations may be effected regardless of the antitrust laws of the country, along certain lines, under the jurisdiction and regulation and control of the Interstate Commerce Commission. To-day, we are making an experiment in the control of an organized business. Just consider the first great test of that experiment which occurred last year in this section 15a.

After every great war everybody knows there is a conflict between two forces, one to keep prices up to the high level that they have reached during the war; the other, the forces of society and commerce, attempting to reduce these prices back to the prewar level, get back to a sane working basis. After the war of 1812, during the first two years there was a decline in prices. A computation has been made using the average wholesale prices of 1909–1913, inclusive, as the base, and then using that as the base figure, they found in 1814 the average wholesale price was 235, and in 1865 it was 200, and in 1918, at the close of the World War, it was 200. You see there was almost identically the same wholesale average as at the close of the Civil War.

But what happened during the next two years? During the first two years after the war of 1812 prices declined 78 points. During the first two years after the Civil War they declined 41 points. During the next two years after the World War they increased 50 points. Directly the opposite of what you would expect, and what occurred after the other great wars.

What is the distinguishing feature? Of course, those other two wars, perhaps, were confined to this country, and did not affect the world like the World War. Yet in the World War other nations had their populations go back to the task of production. Another factor besides that striking difference, I believe, is this, that business and labor were better organized after the World War than after the Civil War or after the War of 1812. And that organized business and organized labor kept prices up. But that could only be temporary. Prices had to come down. The forces of commerce compelled it, one year after June, 1920, the very next year, prices declined in this country 100 points under this same index number system. There was twice as great a decline in that 12 months as occurred during any other year in the history of the

United States. There was a precipitous decline, creating great hardships, in many industries, uncertainty, confusion, and almost panic.

One would think that if the Government had taken control over a given industry, that it would see to it, through the representatives of the public, that it participated in that decline. In fact, that it should lead in that decline. But what occurred? The railroads constitute almost the only industry in America that refrained from participating in that decline, and instead of that, raised their rates and charges during that year. The coal industry may have done it to a substantial extent also. The weakest industry in resisting these forces was agriculture. The strongest was the railroad corporations.

Railroad labor has been forced to take a decline of $400,000,000, and yet up to the present moment the railroad corporations have not participated in a general decline. There have been individual rate reductions on commodities of substantial size here and there, but when figures are given of that sort do not forget that there are thousands of items in an ordinary railroad classification, and that there are literally millions of tariffs, if you include supplements. Consequently with regard to any long imposing list of rate reductions, do not let it have too great a weight on your mind.

I have in front of me here a little chart showing the average revenue per ton-mile from all traffic for the last 38 years. It shows that in June, 1921, the average revenue per ton-mile was 12.78, while in August, 1920, it was 9.59—in other words, about one-third greater than last August, which pretty nearly approaches the advances authorized last year—40 per cent in the eastern district, 35 per cent in the western group, 25 per cent in the southern territory, 25 per cent in the mountain Pacific, and 33⅓ per cent on interterritorial shipments. So that up till June of this year the average revenue per ton-mile approximated the full advance, considering all traffic as a whole. And the figures, gentlemen, during the past few months, from March to June—13.35 to 12.78—are the highest of the present generation.

If we go back to 1882, it was 12.36 mills. That figure in 1882 is compiled by Poor in Poor's Manual. He was making computations analogous to what the Interstate Commerce Commission subsequently undertook to cover, and I have his figures back to that date. Prior to that date they were higher. But here was a great industry, of course, that had been growing, and like the electrical industry to-day, prices were properly reduced, and the public was permitted to share in the results of the inventions and the genius that had built up that great industry, and in fact they were permitted to share in it clear down to very recent times. The railroads through a wise policy, preserving competition, reduced charges and at the same time their revenues increased.

But along about 1910 a very concerted effort has been made upon their part, through most able representatives, officials and counsel, to change that tendency, to make rates go up, and I think that the culmination of that effort occurred last year. I think it was from the railroad standpoint a huge blunder. I think if they could have only seen the wisdom, even if Congress did not, of keeping on an even keel during that reconstruction after the war period, while other industries were reducing their charges, of keeping steady, along an even base, when industries are so vitally connected with the relationship in rates, it would have permitted a restoration to the prewar basis far better and have meant much more money to the railroads themselves, if they could have done that.

As it is, the conditions in America are appalling. Recently we had a hearing, and it was shown that the farmers in the West were working at the rate of from 5 to 25 cents an hour, in producing grain without allowing any time for the miscellaneous labor, And that is just confining it to the hours spent in plowing and tending to the grain, without allowing one penny for return on the investment. Railroad labor is getting on an average, I understand, 61½ cents an hour.

We think that the railroad corporations should have reductions in their costs. We think that railroad labor should share in this reduction. We think that they should come with the rest of us. But they have shared by $400,000,000 and about 500,000 of the employees have been discharged in the past year, deprived of their daily livelihood. They have participated in this reconstruction period. And I think that when we have absorbed a substantial part of that by reduction in our transportation costs, that then labor should come on with the rest of us, and the corporations should, until we get back closer to the prewar level. It is not necessary for us to get back clear to the prewar level, perhaps, although I have figures indicating that to-day cattle, hogs, and sheep are actually on an average selling below the 1913 level. I think that that is an abnormal situation. Those prices must be advanced somewhat. It might be well for us all to stop 20 or 30 per cent above the prewar level.

I believe that the railroad executives of the country are beginning to realize the necessity that they must share with the rest of us in this after the war reconstruction condition, although a few months ago they were positive that they could not do that. I believe it is safe to say that the greatest stumbling block that has prevented that development during the past year has been section 15a of the transportation act. I think that that gave the executives a wrong viewpoint, temporarily, which is now being corrected. I think it gave the Interstate Commerce Commission the wrong slant at this problem, which has now been corrected. I think that their recent decision in the grain case is epoch making. It is a masterly opinion, a wise one. And I only trust that it is a forerunner, a precedent, for decisions on other basic industries.

In section 15a, paragraph 2, there is this language used [reading]:

"*Provided*, That the commission shall have reasonable latitude to modify or adjust any particular rates which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

The CHAIRMAN. You are speaking of the provision that the rates should be adjusted on a 5½ per cent basis as nearly as may be?

Mr. THORNE. Yes, sir. Now there is grave doubt in the minds of some people, and there was in the minds of the commissioners, about the ability to make a general horizontal reduction on a large list of commodities, even though that phraseology is modified to that extent. And for that reason many conferences have been held in hopes that the railroads themselves might voluntarily perform this act. But why should the commission's judgment be deprived from functioning? Why could not the Government, through its commission, help see that the railroads participated in this readjustment? It seems to me that if you gentlemen could only see your way clear, because of the crisis in American industry, because of this phenominal upheaval that has occurred during the past 12 months, because of the conditions generally in this Nation, so different from what they were when this law was passed, if you gentlemen could only see your way clear to eliminate section 15a, it would be a great contribution to the welfare of the nation.

The Interstate Commerce Commission has changed its position.

The railroad executives are changing their view point.

Certainly Congress should be willing to modify its former position on their issue.

The conditions are getting somewhat better; although I understand the return for the past year has been a little less than 3 per cent, in recent months it has been going up to 5 and 6 per cent on the property. The railroads have made the claim, however, that that has been brought about by slashing maintenance expenditures. You have seen that statement made recently by Mr. Cuyler, speaking for all the executives in Chicago, about their tremendous reductions. It has been carried in many railroad magazines, and in the press, and in speeches by railroad officials, and also I believe made in the statement by the Director General of Railroads in a communication to the President.

We made a little analysis of that, and we find that the percentage of bad order cars is about twice that of a year ago; that the bad-order cars are about double what they were a year ago. But contemporaneous with that we find that the number of cars on the home lines are from two to five times as many as a year ago. I don't know whether the full significance of that fact has impressed itself on your mind or not. The cars were scattered all over the Nation during the war. They were not back on the property of the owner. And then immediately there became a general movement to get them back on the home lines, through various causes. A car off of the home line is not declared bad order unless it is unsafe. That is not the test of declaring it bad order on the home line. You do not declare your automobile bad order simply when it becomes unsafe. You make repairs for other reasons than that, many repairs. The car that would be described as bad order on the home line would not be described as bad order on the foreign line, and when the cars got back on the home lines it was natural for the percentage of bad-order cars to increase very, very greatly.

I have a little table here showing that for a number of representative lines in the western district. One column indicates the per cent of box cars on the home road, and another column represents the per cent of bad-order box cars to total on the line. For example, for the Southern Pacific Bad-order cars increased from 6.3 to 13.8; double. But the percentage of cars on the home road increased from 4.2 to 58.5. I think that is fairly typical.

Then the question came up: What about locomotives? They do not go off of the home road. Is the percentage of bad order locomotives any greater this year than it was before? And we find a very interesting situation. There are no more bad order locomotives this year than there were last year, according to this analysis that we have made of a number of western roads for the recent grain case.

Then we followed that with another computation in which we attempted to find out the relationship of maintenance expenditures to total expenditures. Very frequently the comparison is made of maintenance to revenues. That is hardly fair, because revenues may decline, and you may starve your maintenance. Revenues would not represent the increase in cost of labor and supplies, but your general expenses do represent increased cost of labor and supplies. Consequently the percentage of total maintenance expenses to total expenses is a very significant factor.

We made that comparison for the month of June, 1921, with the same month for previous years, and with the average for a number of years. We find that the per cent of maintenance to total operating expenses has remained very, very constant during the past seven years, or back to 1914. And the claim that they have been slashing maintenance we think is hardly justifiable by the facts.

Senator LA FOLLETTE. Mr. Thorne, will you put each of these tables to which you have referred in giving your testimony into the record?

Mr. THORNE. All right, Senator, I will be very glad to do so.

Senator LA FOLLETTE. Together with the chart which you presented.

Mr. THORNE. Yes.

In support of our claim in regard to that point, we want to call your attention to one paragraph in the decision of the commission in the Grain case (64 I. C. C., 97):

"The respondent's estimate that equating to a full year the results for the nine months commencing September 1, 1920, the net railway operating income of the western Class I roads, yielding a return of 2.78 per cent; freight operations, 2.54 per cent; and passenger operations, 3.43 per cent. They estimate the return for the first five months of 1921 as being at the annual rate of 1.64 per cent. The returns are stated in relation to the value set out in our findings in ex parte No. 74 which applied to all railroads in the western district. The reports made by the respondents for the months following those shown indicate a much more favorable return. Thus, making allowance for seasonal variations, the monthly reports of Class I roads for August, 1921, show a return at the annual rate of 6.47 per cent for the western steam roads and 5.02 per cent for the whole United States. The claim is advanced that the actual results are less favorable than appears, because important maintenance work has been postponed which would normally have been performed. This undermaintenance is estimated by respondents to be at the rate of $188,000,000 per annum. Maintenance in recent months apparently has not been markedly subnormal. The expenditures by the western Class I roads for June, July, and August of the present year are substantially double the average expenditures for those months in the test period."

The CHAIRMAN. I made a little computation some time ago, I think, closing with the month of July, 1921, which at that time was as far down as I could carry it. The railroads as a whole spent $100,000,000 less in expenses of transportation than in the 12 months preceding.

Mr. THORNE. Now you are speaking of the 12 months' period compared to another 12 months' period?

The CHAIRMAN. The railroads reduced their expenses of transportation, that is all, including maintenance, $100,000,000 in the year closing with July, 1921, less than in the previous year.

Mr. THORNE. There were 500,000 less employees in July, 1921, than the year before. The year before was a very phenomenal and unusual year. You must remember that during that period you had a transition from Government operation to private operation, with all of the attendant uncertainties; you had a bill pending in Congress that was involving some radical basic changes in the whole transportation structure; you had the very peak of prices the year before; a year later you had prices back toward the prewar basis, a decline, as I previously indicated, of 100 points in that one year that you speak of. Last year was very, very unusual.

And more than that, last year the railroads had a great advance rate case pending. And business fell off during that year enormously.

I do not want to leave the impression on your minds that we think it is wise to starve the railroads, that we think it is wise to have them undermaintained, or that we think it is wise to have poor credit. That is absolute folly. We can not afford that. The railroads must function, must be permitted to reduce their costs, and railroad labor must help them reduce their costs. It is a problem in which we all are concerned. I do not challenge any man's motives. It is a question of judgment what is for the good for us all. It seems to me that the present law is unfortunate. It defies basic economic law in attempting to make revenues in one industry produce an average rate of return that was even greater than the most prosperous period in their entire history, the test period. Everybody else was suffering from a readjustment so costly, so burdensome, and were reducing their charges everywhere.

We think that that provision should be stricken from the law just as quickly as it possibly can be for the sake of the railroads themselves, as well as for the American public outside of the railroads, and we further believe that the powers of the State commissions should be restored, not as a troublesome interference with railroad operation or with Federal regulation. We believe that as the Supreme Court declared in the Shreveport case, there must be but one master. In a case of conflict and unjust discrimination in rates created by an order of the State commission that order must yield.

But phraseology now on the statute books has been so interpreted, whether ambiguous or not, as to practically destroy efficient functioning of State commissions, and we must have them as a check on the Interstate Commerce Commission. The Interstate Commerce Commission prior to this transportation law was, I think, rapidly becoming one of the most esteemed, respected, and revered tribunals in America. It was functioning as a great tribunal, and yet it is possible for the Interstate Commerce Commission to go wrong. There is no appeal from that commission so far as facts are concerned. Unless the finding of the Interstate Commerce Commission is wholly wanting of a scintilla of evidence of facts there is no appeal. The courts will observe their findings of fact. The Interstate Commerce Commission is a final tribunal, and yet also a tribunal of original jurisdiction. The tribunal before whom you first try your case is the ultimate, final authority. Only one tribunal in the entire Nation to take care of all these intricate problems from one end of the Nation to the other.

Now we believe that there should be a check on the Interstate Commerce Commission, and that the State commission furnishes an admirable tribunal for that purpose. The State commissions do go wrong—all of us do go wrong—but their decisions have been set aside. If they order us rates that are confiscatory in character, the courts will set them aside. If they go wrong in adopting wrong policies, it is only a question of time until public sentiment compels a readjustment.

There is some human nature in this whole problem. If you were at the head of a railroad you would not want to be constantly interfered with, and you would try your best to get rid of that interference, Sometimes there are mistakes, unfortunate errors made, but then that evil is a necessary evil, because the benefit of having that check far exceeds that in importance. If you are going to have an industry which can, through its committees, fix rates and charges for every little thing they handle, from a pin to a large piece of machinery, everything we eat or wear, everything we need in our lives, and they can fix the price of carriage of those commodities, not just in a few places, but to and from every village and hamlet in America, it is necessary for us to have some system of regulation. And it is best for the public, and ultimately for the railroads themselves, that this system which we have been gradually developing should be restored just as quickly as possible. It is for the good of the railroads and it is for the good of the public.

That is all.

The CHAIRMAN. Does any member of the committee desire to ask Mr. Thorne anything?

Senator LA FOLLETTE. I do not, as far as I am concerned.

The CHAIRMAN. Senator Fernald?

Senator FERNALD. No.

Mr. THORNE. I will present a statement showing comparison of maintenance expenses with the total operating expenses for the six months ending December 31, 1914, and for the years 1915 to 1920, inclusive, for six months of the year 1921, and for the month of June for the years 1914 to 1921, inclusive, and a statement of locomotives' condition for seven months ending July 31, 1921, compiled semimonthly.

And a statement showing per cent of home box cars on home roads and per cent of bad-order box cars to total on line for year ending July 31, 1921.

(The CHAIRMAN. We will suspend at this time until to-morrow morning at 9 o'clock, when we will hear Judge Cowan.

Mr. THOM. Then my understanding is, Mr. Chairman, that the hearing will go over until probably Monday?

The CHAIRMAN. Yes.

(Whereupon, at 10.15 o'clock a. m., an adjournment was taken until Wednesday, November 9, 1921, at 9 o'clock a. m.)

Western district—Statement showing comparison of maintenance expenses with the total operating expenses for the 6 months ending Dec. 31, 1914, and for the years 1915 to 1920, inclusive, for 6 months of the year 1921, and for the month of June for the years 1914 to 1921, inclusive.

[Authority: Interstate Commerce Commission, Bureau of Statistics. Reports of revenues and expenses of large steam roads by calendar years 1915 to 1920 and by months, January to December, 1920, by months, July, 1914, to December, 1920. 1921 Monthly reports I. C. C.]

Period.	Total expenses.	Maintenance of way and structure.		Maintenance of equipment.		Total maintenance.	Per cent maintenance expenses of total expenses.
		Total.	Per cent of expenses.	Total.	Per cent of expenses.		
6 months Dec. 21, 1914	$412,217,166	$81,493,079	19.77	$94,601,801	22.95	$176,094,880	42.72
12 months Dec. 31, 1915	807,823,770	167,945,639	19.55	185,561,212	22.97	343,506,851	42.52
12 months Dec. 31, 1916	921,355,227	183,292,308	19.89	217,492,390	23.61	400,784,698	43.50
12 months Dec. 31, 1917	1,089,347,123	190,587,049	17.49	248,925,283	22.85	439,512,332	40.34
12 months Dec. 31, 1918	1,486,947,667	268,579,174	18.06	394,263,009	26.52	662,842,183	44.58
12 months Dec. 31, 1919	1,676,803,713	328,312,471	19.58	438,215,454	26.13	766,527,925	45.71
12 months Dec. 31, 1920	2,191,542,692	455,325,115	20.78	552,241,621	25.20	1,007,567,736	45.98
January, 1921	164,561,942	24,931,398	15.15	44,881,113	27.27	69,812,511	42.42
February, 1921	141,871,494	20,145,477	14.20	39,107,108	27.56	59,252,585	41.76
March, 1921	150,521,551	27,484,137	18.26	36,628,146	24.33	64,112,283	42.59
April, 1921	142,548,020	24,055,339	16.88	37,188,706	26.08	61,244,045	42.96
May, 1921	143,273,629	25,872,695	18.75	36,488,464	25.47	63,361,159	44.22
June, 1921	142,003,448	28,147,356	19.82	34,720,765	24.45	62,868,121	44.27
Month of June:							
1914	69,319,704	16,581,299	23.92	14,821,710	21.38	31,403,009	45.30
1915	65,636,720	14,581,008	22.21	14,628,460	22.29	29,209,468	44.50
1916	76,257,916	17,921,090	23.50	17,392,990	22.81	35,514,080	46.31
1917	88,991,233	18,319,018	20.59	19,085,167	21.45	37,404,185	42.04
1918	155,465,706	28,285,722	18.19	35,016,652	22.52	63,302,374	40.71
1919	136,003,050	28,130,295	20.68	34,453,434	25.33	62,583,729	46.01
1920	171,898,306	40,269,004	23.42	41,616,965	24.22	81,885,969	47.64
1921	142,003,448	28,147,356	19.82	34,720,765	24.45	62,868,121	44.27

Western district.—Statement of locomotives condition for seven months ending July 31, 1921, compiled semimonthly.

[Authority: American Railway Car Service Association semimonthly reports.]

	Number on line.	Number serviceable.	Number stored serviceable.	Number for repairs requiring over 24 hours.	Number for repairs requiring less than 24 hours.	Out of service for repairs requiring over 24 hours.	Out of service for repairs requiring less than 24 hours.	Number turned out of shop.
						Per cent.	*Per cent.*	
Jan. 15, 1921	25,037	18,799	1,033	4,718	485	18.8	1.9	4,008
Feb. 1, 1921	25,076	18,850	1,102	4,636	488	18.5	1.9	4,296
Feb. 15, 1921	25,111	18,288	1,573	4,780	470	19.0	1.9	3,970
Mar. 1, 1921	25,163	17,948	1,898	4,874	470	19.4	1.9	3,690
Mar. 15, 1921	25,169	17,529	2,154	5,060	426	20.1	1.7	3,730
Apr. 1, 1921	25,178	17,516	2,405	4,791	466	19.0	1.9	4,396
Apr. 15, 1921	25,196	17,306	2,534	4,922	434	19.5	1.7	3,619
May 1, 1921	25,239	17,521	2,621	4,635	450	18.4	1.8	3,890
May 15, 1921	25,194	17,260	2,719	4,792	423	19.0	1.7	3,456
June 1, 1921	25,266	17,331	2,753	4,474	382	17.7	1.5	3,974
June 15, 1921	25,190	17,580	2,667	4,538	423	18.0	1.7	3,472
July 1, 1921	25,207	17,527	2,621	4,329	479	17.2	1.9	3,089
July 15, 1921	25,204	17,734	2,449	4,572	449	18.1	1.9	3,165
Aug. 1, 1921	25,193	18,108	2,289	4,298	496	17.1	2.0	3,782

Statement showing per cent of home box cars on home roads and per cent of bad-order box cars to total on line for year ending July 31, 1921.

[Authorities: American Railway Association Car Service Division, semimonthly statements, Forms S. S.-60A and 61A.]

	Great Northern.		Chicago, Burlington & Quincy.		Chicago, Rock Island & Pacific.		Chicago & North Western.	
	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
July 15, 1920	20.8	10.0	14.1	7.6	21.0	5.9	17.8	7.6
Aug. 1, 1920	23.2	9.5	14.2	8.1	22.2	6.0	19.2	7.2
Aug. 15, 1920	25.2	7.8	17.4	7.9	21.2	6.0	19.1	6.4
Sept. 1, 1920	27.9	7.1	15.7	8.0	21.2	6.4	23.5	7.6
Sept. 15, 1920	28.6	8.1	15.8	8.4	22.8	5.8	28.8	9.0
Oct. 1, 1920	30.2	8.7	16.6	8.8	23.4	5.7	25.6	8.6
Oct. 15, 1920	31.7	9.3	16.9	8.6	26.1	6.4	25.6	8.6
Nov. 1, 1920	32.7	8.5	18.9	7.6	15.1	7.0	28.6	9.0
Nov. 15, 1920	33.6	7.9	20.3	8.2	17.8	7.3	27.5	8.9
Dec. 1, 1920	41.4	7.2	22.2	8.7	34.4	7.4	33.0	8.2
Dec. 15, 1920	41.4	7.2	29.3	6.9	33.2	8.5	36.7	11.0
Jan. 1, 1921	55.9	6.8	38.3	8.5	44.4	7.8	48.2	9.6
Jan. 15, 1921	55.9	6.8	46.0	9.6	55.4	7.5	52.0	9.5
Feb. 1, 1921	70.4	12.9	48.4	11.3	57.9	8.3	51.5	8.5
Feb. 15, 1921	76.4	16.9	53.5	10.6	59.3	8.3	54.1	9.2
Mar. 1, 1921	78.0	18.0	57.5	12.2	62.5	8.5	56.3	9.5
Mar. 15, 1921	79.4	17.3	56.9	12.5	62.5	8.6	55.8	9.7
Apr. 1, 1921	81.7	18.0	62.6	13.1	64.9	7.6	55.9	11.6
Apr. 15, 1921	84.8	19.9	63.5	16.0	66.8	8.9	56.0	12.1
May 1, 1921	84.3	22.2	63.4	16.7	67.7	8.8	57.0	10.3
May 15, 1921	84.1	23.3	61.5	19.8	69.0	9.0	57.4	10.7
June 1, 1921	83.2	29.3	60.6	20.7	68.2	11.0	58.6	12.2
June 15, 1921	82.6	30.2	61.7	16.8	70.2	10.1	57.8	12.4
July 1, 1921	81.3	30.6	61.7	16.8	68.1	10.7	61.2	12.2
July 15, 1921	81.7	28.7	66.8	13.3	66.7	8.8	62.7	13.3
Aug. 1, 1921	83.6	25.6	55.6	13.8	63.8	10.2	58.9	15.3

	Union Pacific.		Atchison, Topeka & Santa Fe.		Chicago, Milwaukee & St. Paul.		Missouri Pacific.	
	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
July 15, 1920	8.3	8.7	13.6	9.3	17.4	9.4	10.1	5.3
Aug. 1, 1920	8.5	8.7	13.0	8.1	18.7	9.0	12.0	5.3
Aug. 15, 1920	9.6	8.2	13.2	8.4	26.6	7.8	12.9	5.6
Sept. 1, 1920	10.2	6.8	13.6	9.3	20.2	7.8	12.9	5.3
Sept. 15, 1920	10.9	8.3	14.8	9.5	23.7	6.8	13.0	4.7
Oct. 1, 1920	10.8	9.1	16.3	8.8	23.7	8.2	4.3	4.5
Oct. 15, 1920	11.7	9.5	17.5	8.8	24.5	9.2	13.3	5.5
Nov. 1, 1920	13.2	9.2	20.4	8.2	24.5	9.0	16.5	6.5
Nov. 15, 1920	15.9	10.2	21.9	8.3	26.0	8.0	18.3	5.6
Dec. 1, 1920	22.0	10.1	24.9	8.1	27.9	9.4	22.1	5.6
Dec. 15, 1920	31.0	10.8	30.1	8.3	33.6	8.8	31.3	4.5
Jan. 1, 1921	40.4	12.8	43.3	9.2	41.8	9.5	38.1	6.4
Jan. 15, 1921	51	13.9	31	11.4	47.9	9.3	46.2	6.2
Feb. 1, 1921	55.3	15.4	51.6	11.2	54	9	50.5	7.3
Feb. 15, 1921	60.6	16	64.5	11.6	58.1	10.7	58.6	6.6
Mar. 1, 1921	62	19	67.9	11	64.7	9.9	62.8	6.8
Mar. 15, 1921	62.3	20.3	68.2	11.2	63.9	11.5	39.6	6.2
Apr. 1, 1921	64.7	21.6	70	11.2	65	12.4	62.9	7.6
Apr. 15, 1921	66.4	23.2	71	11.7	65	14.4	64.2	8.4
May 1, 1921	66.4	25.9	71.4	11.9	65.4	17.4	64.9	9.9
May 15, 1921	66.7	26.8	70.4	11.4	66.5	18.8	65	10
June 1, 1921	66.4	25.8	70.2	12.2	66.3	20	64.9	11
June 15, 1921	65	24.7	69.7	11.7	65.4	22.6	64.7	9.8
July 1, 1921	62.8	19.6	62.5	11.7	66.3	24.7	66.6	8.1
July 15, 1921	61.6	18.7	60.8	11.5	67	24.2	66.7	9.1
Aug. 1, 1921	56.7	18.7	63.7	10.7	68.5	22.5	57.6	10.6

Statement showing per cent of home box cars on home roads and per cent of bad-order box cars to total on line for year ending July 31, 1921—Continued.

	Minneapolis, St. Paul & Saulte Ste. Marie.		Chicago, St. Paul, Minneapolis & Omaha.		Northern Pacific.		Southern Pacific.	
	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.	Home box cars on home road.	Bad-order box cars to total on line.
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
July 15, 1920	13.0	9.3	11.7	11.9	20.6	11.4	14.2	6.3
Aug. 1, 1920	17.7	8.5	10.2	11.1	24.4	10.5	15.3	6.8
Aug. 15, 1920	18.1	10.8	11.8	14.0	26.7	10.2	15.6	7.1
Sept. 1, 1920	22.5	11.0	10.9	11.2	29.0	9.5	16.5	5.8
Sept. 15, 1920	22.7	12.9	12.5	13.1	29.1	10.6	16.8	5.4
Oct. 1, 1920	26.1	11.8	14.8	12.9	31.3	11.1	18.2	5.4
Oct. 15, 1920	27.5	10.9	17.3	11.5	34.0	12.0	17.8	5.8
Nov. 1, 1920	29.8	10.1	14.8	15.1	34.8	11.4	19.7	7.2
Nov. 15, 1920	30.2	10.6	15.7	13.1	35.3	11.4	19.5	6.6
Dec. 1, 1920	37.1	11.9	16.0	17.7	40.8	8.2	21.5	6.5
Dec. 15, 1920	42.1	14.4	19.5	12.1	47.1	9.1	23.5	7.9
Jan. 1, 1921	49.1	16.8	22.5	12.3	54.5	9.5	27.2	14.7
Jan. 15, 1921	52.8	19.1	23.6	12.3	60.1	9.2	30.6	11.9
Feb. 1, 1921	55.1	21.2	19.2	14.0	63.4	10.9	37.5	12.9
Feb. 15, 1921	58.4	21.9	24.5	8.5	67.2	11.7	45.7	13.3
Mar. 1, 1921	60.3	22.0	25.8	12.8	70.0	13.0	48.0	16.4
Mar. 15, 1921	62.2	23.7	28.8	11.4	71.1	13.5	48.7	17.2
Apr. 1, 1921	63.1	25.4	27.2	11.0	73.4	12.1	52.6	18.7
Apr. 15, 1921	64.2	27.4	28.6	10.2	76.8	14.1	55.0	18.6
May 1, 1921	71.8	27.1	29.5	10.3	76.1	14.8	56.4	20.0
May 15, 1921	70.3	27.1	30.2	9.7	76.1	15.8	58.0	19.0
June 1, 1921	70.8	25.4	32.8	10.3	76.7	17.3	58.6	17.3
June 15, 1921	69.4	26.3	32.6	11.7	76.0	16.4	57.9	18.6
July 1, 1921	69.5	25.0	32.6	14.1	77.9	14.8	58.8	15.6
July 15, 1921	70.3	23.9	32.3	16.5	76.2	16.2	59.0	14.9
Aug. 1, 1921	78.8	20.0	31.3	19.3	76.1	38.1	58.5	13.8

Revenue per net ton-miles on United States railroads from year 1882 to date.

Date.	Revenue per net ton-mile.	Date.	Revenue per net ton-mile.
	Mills.		*Mills.*
1882	12.36	1897	7.98
1883	12.36	1898	7.53
1884	11.24	1899	7.24
1885	10.57	1900	7.29
1886	10.42	1901	7.50
1887	10.63	1902	7.57
1888	10.01	1903	7.63
1889	9.22	1904	7.80
1890	9.41	1905	7.66
1891	8.95	1906	7.48
1892	8.98	1907	7.59
1893	8.78	1908	7.54
1894	8.60	1909	7.63
1895	8.39	1910	7.53
1896	8.06		

Revenue per net ton-miles on United States railroad from year 1882 to date—Continued.

Date.	Revenue per net ton-mile.	Date.	Revenue per net ton-mile.
	Mills.	1920—Continued:	*Mills.*
1911	7.43	May	9.54
1912	7.30	June	9.70
1913	7.19	July	9.56
1914	7.23	August	9.59
1915	7.22	September	11.51
1916 (fiscal)	7.07	October	12.26
1916 (calendar)	7.07	November	12.63
1917	7.15	December	12.09
1918	8.49	1921:	
1919	9.73	January	12.10
1920:		February	12.54
January	9.69	March	13.35
February	9.85	April	13.34
March	9.86	May	12.51
April	9.81	June	12.78

Prior to 1916 figures are for fiscal years ending June 30, and subsequently figures are for calendar years.

Years 1882 to 1887 cover reports of roads operating over 90 per cent of mileage of the United States. Authority Poor's Manual of Railways for year 1888.

Years 1888 to 1907, inclusive, cover reports of all roads. Authority Statistics of Railways in the United States of the Interstate Commerce Commission.

Years 1909 to 1911, inclusive, cover reports of all roads except switching and terminal companies. Authority reports of the Interstate Commerce Commission.

Subsequent to 1911 figures are for all class I carriers. Authority Bureau of Statistics of the Interstate Commerce Commission yearly and monthly reports.

MODIFICATION OF TRANSPORTATION ACT, 1920.

MONDAY, NOVEMBER 14, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will be in order.

Mr. Thom, I think we will be compelled to proceed. There will be other members of the committee in, but we can not wait and make any progress.

Mr. THOM. Mr. Chairman and gentlemen, the first witness will be Mr. Frederick H. Wood, general attorney and commerce counsel of the Southern Pacific Railway.

The CHAIRMAN. We will hear Mr. Wood. State your name and position. Mr. Wood, and your general relation to this subject.

STATEMENT OF MR. FREDERICK H. WOOD, GENERAL ATTORNEY AND COMMERCE COUNSEL OF THE SOUTHERN PACIFIC CO., NEW YORK CITY.

Mr. WOOD. Mr. Chairman and gentlemen of the committee, my name is Frederick H. Wood; I am general attorney and commerce counsel of the Southern Pacific Co., with headquarters at New York. I have occupied that position for the past eight years. Previous to that time, for some 10 years, I was connected with the law departments of various railroads in the Middle West, and ever since the passage of the amendments to the interstate commerce act, in 1906, have been familiar with matters arising under that act; and for the past 10 or 11 years I have devoted the larger part of my time to matters before the Interstate Commerce Commission.

QUESTION ONE OF PUBLIC POLICY.

I appear here to-day as one of the representatives of the Association of Railway Executives, and at Mr. Thom's request, and what I say on the subject matter of the pending bills will be confined entirely to that one of the proposals before the committee that relates to the jurisdiction of the Interstate Commerce Commission over State rates. To the extent that anything will be said about the other proposals, that will be said by other gentlemen who will follow me. It has been suggested in the statements of the proponents of these measures that the Interstate Commerce Commission, in the series of cases following its own decision in Ex parte 74, has misinterpreted the provisions of the statute. I do not think it has. But whether it has or not, that matter is now before the Supreme Court for determination. It has also been suggested that if it has not in point of fact misinterpreted the statute, it has, by its various orders in those cases, exercised a jurisdiction which was not at least within the intention of individual Members of Congress, or possibly of Congress as a whole. As to that, of course, I am not able to speak. But I take it that the real question that arises before this committee on these bills is, whether the exercise of this jurisdiction by the Interstate Commerce Commission in the manner in which it has exercised it, is consistent with the requirements of public policy, with the practical requirements of national regulation, and with the fundamental purposes which Congress had in mind in the passage of the transportation act. And I shall approach the subject matter from that standpoint.

Just a word, however, as to the Interstate Commerce Commission's interpretation of the law. It has been suggested, inferentially if not directly, that the Interstate Commerce Commission found or assumed to find its jurisdiction over State rates and bottomed its orders in these various cases upon the provisions of section 15a. That, as I read the opinions of the Interstate Commerce Commission, is not a fact. In the very first case which came before the commission involving State rates, which was the New York case, the commission in its opinion reviewed the provisions of section 15a, its purposes, and the action of the commission thereunder, and at the conclusion of that review stated as follows—I read verbatim from the report, pages 293 and 294:

"This should not be construed as holding jurisdiction over intrastate rates and fares has been taken away from the States and reposed in us. We find nothing in the law to indicate that such was the intent of Congress."

Now, it is true that in each of the series of State cases the Interstate Commerce Commission did examine the effect upon the revenues of the carriers by the nonaction or diversity of action of the particular State in question.

But the amount of revenues involved is manifestly a pertinent inquiry in any matter or any case before the Interstate Commerce Commission. It is a matter of importance both to the carriers, who are present, and to the shippers. Where the issue is primarily one of undue discrimination, the revenue feature or the amount involved represents the money value of the discrimination that is practiced in the event that the Interstate Commerce Commission should find that there is a discrimination. It is also true that in its consideration of these cases the commission reviewed, some times at considerable length and in later cases at less length, its own opinion in Ex parte 74, which action in that case was, of course, based upon the provisions of section 15a. But that, also, it would seem to me, was an appropriate thing for the commission to do. Certainly, in directing considerations of that sort to the Interstate Commerce Commission, counsel for the carriers at least thought they were asking the commission to take into account or to consider attending circumstances and conditions surrounding the whole matter.

The question of discrimination, or absence or presence of discrimination in any proceeding before the Interstate Commerce Commission, always depends upon the attendant circumstances and conditions. The circumstances and conditions under which the general advance in interstate rates took place, and more than all the causes which induced those advances, were circumstances and conditions equally applicable to State rates.

And so the Interstate Commerce Commission in reviewing what it did in section 15a was merely considering the circumstances which were attendant upon the whole problem. To make my thought a little plainer, the case before the Interstate Commerce Commission (Ex parte 74) and the cases as they were originally presented to the State commissions were not presented as ordinary rate cases; they were presented in view of the critical emergency which confronted both the carriers and the country. In every one of those cases it was a matter of common knowledge that the rates were on a prewar level, except to the extent that they had been advanced by the action of the director general, and that the relation of those rates was the relation which had been brought about by a generation of public control on the part of the Interstate Commerce Commission and the State commissions, respectively.

The general attitude of the carriers in Ex parte 74 and in the cases as presented to the States themselves was that all of those circumstances, most of which were of common knowledge and all of which were abundantly disclosed by the record in Ex parte 74 itself, showed that the time had come when there must be a general advance in all rates if adequacy of transportation was to be preserved and if solvent transportation agencies were to be maintained. That evidence was exceedingly exhaustive. It applied to the situation surrounding the State rates as well as situations surrounding the interstate rates.

The history of any rate and of its consequent relation to any other rate is always an attendant circumstance in any rate case. The history of these rates, as made by the Interstate Commerce Commission in Ex parte 74 showed conclusively that the rates resulting in the advances thus made were absolutely essential in order to preserve the integrity—the financial integrity and the operating efficiency of these railroads, and that the prewar level must go, and that another general level must be substituted for it.

Those were the circumstances under which these interstate rates, which were being contrasted in their various relations with the State rates, had been made, and in our view it was entirely appropriate for the Interstate Commerce Commission, in these State rate cases, to consider whether these attending circumstances, which accounted for the interstate rates, likewise applied with equal force to the situation with respect to the State rates themselves.

So I do not think that the Interstate Commerce Commission overstepped the bounds in any degree in reviewing, in these State rate cases, the circumstances under which it had sought to bring about this new and necessarily advanced general level of rates, and then to consider the relation between those rates as thus advanced, to the various State rates which came before it for review.

Furthermore, in the construction of any statute, it is a fundamental rule that is recognized by all courts and all members of this committee, that the statute must be read as a whole. There must be an attempt to harmonize its several parts. The purposes of one section must be considered in connection with the purposes or administration of other sections.

And so, upon that ground, it was manifestly appropriate and absolutely necessary for the Interstate Commerce Commission, if the Interstate Commerce Commission was going to act in a broad way and in an effort to carry out the purposes of Congress, for it to consider the entire purposes of Congress for whatever influence it might have upon the interpretation of any particular section. But the fact that it did consider the revenue effect; the fact that it did consider the attendant circumstances and conditions under which this general advance had been made; and the fact that it did consider the purposes of the statute as embraced in section 15a, and as embraced in all other sections of the statute, is an entirely different thing from resting the commission's control over State rates themselves upon the provisions of section 15a; and that it did not do.

EVIDENCE OF SPECIFIC DISCRIMINATIONS.

Furthermore, in addition to those considerations to which I have already referred, the Interstate Commerce Commission required in every case the production of evidence, similar in all respects to the evidence offered in the original Shreveport case, and other cases which had followed that case before the passage of the transportation act, as to the relation between State and interstate rates, and between the persons and localities that were interested in the one or in the other. Evidence of that character was before the commission in every one of those cases. Manifestly it would have been impossible to have submitted to the commission evidence of that character dealing with every specific rate between any two points within a given State and its relation to some other interstate rate. To suggest that anything of that sort is required is unthinkable. It would prevent the Interstate Commerce Commission from administering the law in any practicable sort of a way, and would impose upon the commission and upon the carriers the necessity for a greater degree of proof, in connection with State rate cases, than is demanded by the statute and by the Interstate Commerce Commission in connection with interstate cases.

Where general rate adjustments are before the commission under section 3, which is the section which deals with undue discrimination, and it is claimed that that general rate adjustment has resulted in undue discrimination against a given locality or against a given set of persons or a given organization of persons—in cases of that character, relating wholly to interstate commerce the Interstate Commerce Commission has always considered, and the carriers in those cases—and they are usually on the respondent's side of the affair contesting it—the carriers have always conceded that those cases may be and should be presented by illustrative cases bearing upon the general situation, and that it is not necessary, and it would be manifestly unjust to impose upon a community or upon a set of shippers in a case of that sort the necessity of bringing to the attention of the Interstate Commerce Commission every individual rate in that large adjustment.

I have in mind, for example, a case brought by the city of Santa Rosa, Calif., a little point some 50 or 60 miles from San Francisco, a case which came up some 10 years ago under section 3 of the interstate commerce act. It was a case that related entirely to interstate rates. The position of Santa Rosa was that the adjustment of transcontinental rates to other points as compared with the adjustment of transcontinental rates to Santa Rosa resulted in undue discrimination.

Now, that was not a case in which section 4 of the interstate commerce act was properly involved. It was a question that bore upon the commercial opportunities of Santa Rosa as compared with the commercial opportunities of other centers in California by reason of the relative adjustment of rates as between Santa Rosa and those other points.

The commission heard that case upon the basis of testimony dealing with the relation of individual rates to Santa Rosa and those other places from various points in the United States, dealing with certain class rates and with certain commodity rates, presented as representative of this general adjustment of rates as between Santa Rosa and those other points, out of which general adjustment it was claimed that this undue discrimination existed against Santa Rosa and which it was claimed should be removed in whole and not merely in part.

That fact was not contradicted by the carriers; in point of fact, it was not susceptible of contradiction by the carriers, and the Interstate Commerce Commission, upon the evidence made an order then in which it seized upon the whole body of rates to Santa Rosa as compared with the whole body of rates to the other points in California and found that that general situation inhered in the general adjustment of rates, and ordered it removed by the establishment of that proper relation which the Interstate Commerce Commission found that the general adjustment of the whole body of rates to Santa Rosa should bear to these other points.

Under these cases coming up under section 13 of the interstate commerce act, as amended by the transportation act, the Interstate Commerce Commission not only had before it the general situation to which I have referred but it had specific cases and specific relationships affecting the several classes or species of traffic in the several cases before it, which were stated to be representative of a situation which was State-wide, and in no case was there any contradiction of that evidence. In no case did any State commission undertake to show that those cases which had been presented to the Interstate Commerce Commission as representative were not, in point of fact, representative. There were a few cases in which, as to a few individual descriptions of traffic, the State commissions, or shippers residing within that State, took issue on that question, and undertook to show the Interstate Commerce Commission that as to those particular descriptions of traffic this showing which had been made in a Statewide way did not apply. And wherever the issue was joined in that way the commission examined that testimony in a most careful manner, and in some cases it found that the carriers were right in their contentions; that there was no exception between this particular description of traffic on which a specific issue had been joined and the whole adjustment which had been proven up in this representative way. And wherever they found the carriers were right in their contention, then they included that particular description of traffic in their order. In other cases they found that the carriers' contentions were wrong, and that the evidence on this specific issue which had been joined, as to this particular description of traffic, either showed that there was not that same undue discrimination against interstate commerce, as applied to that particular traffic which appeared to inhere in the situation as a whole, or that the matter was involved in so much doubt that it would be an unwarranted exercise of their jurisdiction over State rates to interfere with those particular State rates, and in every one of those cases, where they decided the issue against the carriers, they excepted that traffic from their order.

SECTIONS 15A AND 13 AND THEIR EFFECT.

The CHAIRMAN. May I interrupt you for a moment?

Mr. WOOD. Certainly.

The CHAIRMAN. Assuming that section 15a had not been enacted, and assuming there had been no change in section 13, is it your position that the evidence submitted to the Interstate Commerce Commission in the cases that were brought up after Ex parte 74 had been decided would have been sufficient, under the Shreveport doctrine and the following cases, to have established undue discrimination as between State rates and interstate rates?

Mr. WOOD. In my opinion, the evidence before the commission under those circumstances would have been sufficient, Mr. Chairman.

The CHAIRMAN. Even if the law had not been changed at all?

Mr. WOOD. Even if the law had not been changed at all.

Now, I shall subsequently review one or two of these cases in which I was personally concerned and in which I participated, not in an elaborate way but in a sufficient way to put before the committee the character of the evidence and the contention made. Those cases, I think, were typical of all, and from what I know of the cases in which I participated and of the cases in which I did not participate, but with which I am familiar, I think that without any amendment to the law every one of those orders would be sustained—must be sustained—under the doctrine of the Shreveport case itself.

And so far as section 15a is concerned, I only want to say this about it: My own personal opinion is that neither the general advanced rate case before the Interstate Commerce Commission in Ex parte 74, nor those State rate cases, would have been fundamentally different in any particular, even if section 15a had not been enacted. The emergency for the general advance in rates in order to restore the credit of the carriers and insure adequate transportation facilities would have been just the same. That emergency would have applied just as actutely to the State traffic as to the interstate traffic with or without the provisions of section 15a, and those discriminations growing out of the advance in interstate rates and the failure to advance the State rates would have been exactly the same.

Section 15a changed the course and the procedure in the cases before the Interstate Commerce Commission itself. It substituted, in specific terms, a direct rule of rate making for what had existed before. But, after all, as I see it, section 15a did not do any more, except as to the recapture of earnings provisions, than to write into the interstate-commerce act what everybody recognized to be the requirements of the situation. My own opinion is that those proceedings would not have been fundamentally changed, either in the general advance case before the Interstate Commerce Commission, or in those State rate cases, if section 15a had failed of enactment.

With respect to section 13 as it stands now, and to the provisions of the law as they were previously, and the sufficiency of the evidence in those State rate cases, under the old law, as contrasted with its sufficiency under the new, we come at once, of course, to a consideration of what is the meaning, or what was the meaning of the old law. Whether the jurisdiction of the Interstate Commerce Commission was enlarged by the provisions of section 13, as amended by the transportation act, depends upon what were the limits of its jurisdiction without that amendment.

So far as I know, the Supreme Court, while it has stated with precision what the power of Congress is under the Shreveport case, has not undertaken to define the limits of the jurisdiction of the Interstate Commerce Commission.

Section 3 prohibits discrimination against persons, localities or descriptions of traffic.

I personally have always been of the opinion that those three were all-embracing; that they included every species of discrimination against interstate commerce. If that be true, then section 13 did not increase the jurisdiction of the Interstate Commerce Commission.

The CHAIRMAN. In that respect, we simply added the words "or interstate commerce."

Mr. WOOD. You simply added the words "or interstate commerce." Now, I think, Mr. Chairman, that that was a very valuable addition to the law, even though it was not intended, in terms, to increase the Interstate Commerce Commission's jurisdiction. It seems to me that with the use of that expression, that Congress at least said, "We intend now to make this prohibition all-embracing. The law now says that there shall be no undue discrimination against persons, localities or descriptions of traffic. It would seem that they embrace every species of discrimination; it would seem that the prohibition against descriptions of traffic would embrace a discrimination against interstate commerce on the one hand and State traffic on the other. If there is any doubt as to the all-embracing character of the provision of section 3 as it now stands, we will remove that by the language which has been used by the Supreme Court itself in its decisions, and so we will add the language as now contained in section 13." So for that purpose, if for no other, it seems to me that the inclusion of that phrase was a wise piece of legislation. If I am correct as to what the act meant before, it did not add to the jurisdiction of the Interstate Commerce Commission, but it certainly clarified it. On the other hand, if the previous language of the act, prohibiting discrimination against persons, localities and descriptions of traffic was not all embracing, and did not allow the Interstate

Commerce Commssion to remove any discrimination that it found against interstate commerce, then section 3 did add to the jurisdiction of the Interstate Commerce Commission, and wisely added to it, because it is unthinkable that we may have an effective regulation of commerce in the interest of the people as a whole, and in the interest of the people of all of the States, unless the Federal tribunal itself has the power to remove any discrimination against interstate commerce which it finds.

PROCEEDINGS BEFORE I. C. C. FURTHER CONSIDERED.

But to come back to what happened before the Interstate Commerce Commission, this general review of the cases which I have made, if it is a correct review, demonstrates, I think, that the evidence before it relating to the general situation and relating to the particular situation in that State as made by representative cases, declared to be representative of a State-wide situation, would have been sufficient to justify its orders under the doctrine of the Shreveport case.

Now, if the evidence was insufficient, of course, the Supreme Court can correct that situation, and undoubtedly will correct it. But I think I am safe in saying that whether the Interstate Commerce Commission was mistaken or not, that in every one of those cases it believed that the evidence before it, taken as a whole, consisting of those several parts which I have described, was sufficient, and would have been sufficient to have justified the order that it made, even if there had been no amendment to the interstate commerce act in section 13 or in section 15, through the operation of the transportation act.

The CHAIRMAN. Stating the case in the matter in my own way, the complaint, as I understand it, of the State commissions and organizations which which agree with them in that respect is this: That there was no evidence of discrimination submitted to the Interstate Commerce Commission, except the fact that the State rates were lower than the rates which had been established by the Interstate Commerce Commission for interstate traffic.

Mr. WOOD. Well, Mr. Chairman, that is not a correct statement of the evidence before the Interstate Commerce Commission. It is a most incorrect statement, as applied to every case in which I participated. And while I can not speak with the same authority with regard to those cases in which I did not participate and where my information is based upon hearsay or upon a reading of the carrier's briefs or of the report of the Interstate Commerce Commission, from such review as I have made, I would not hesitate to say that it is an incorrect statement, so far as these cases are concerned.

Senator PITTMAN. Now, Mr. Wood, if I may interrupt you——

Mr. WOOD (interposing). Certainly.

Senator PITTMAN. What difference does it make whether they presented evidence or did not present evidence so far as the Interstate Commerce Commission is concerned; would it make any?

Mr. WOOD. You mean whether the carriers presented evidence or did not present evidence?

Senator PITTMAN. What I mean is, would any evidence have induced the Interstate Commerce Commission to permit a lower rate for interstate traffic along the same line than for interstate-commerce traffic through that State?

Mr. WOOD. Well, that, Senator, I can not answer, because I do not know of any cases in which it was put up in exactly that way. But I will say this—and as I go on I will point out those situations—in numerous cases the Interstate Commerce Commission excepted various commodities and various descriptions of traffic from the orders which it made ordering the removal of discrimination against interstate commerce, and they made those exceptions because, in their judgment, the evidence as to those commodities failed to show an undue discrimination against interstate commerce.

Senator PITTMAN. Now, as I understood you, the Interstate Commerce Commission in fixing a reasonable rate takes into consideration both intrastate and interstate commerce; therefore, they must have had in mind what the rate should be on intrastate commerce at the time they fixed the rate on interstate commerce. Now, if that rate on intrastate commerce was fixed on lower rates than they had in mind, it would be a discrimination, would it not?

Mr. WOOD. I would rather not state their opinion. In my own opinion it would be, and I will undertake to illustrate why I hold that opinion as I go on later.

Senator PITTMAN. Very well.

Mr. WOOD. But the fact is that there is no case that I know of that was decided by the Interstate Commerce Commission in this series of State-rate cases that was, in point of fact, based upon the bald proposition that the mere failure to advance the State rates had resulted in undue discrimination.

Senator PITTMAN. I am not saying what they said. But if the Interstate Commerce Commission has the same opinion you have, then the reduction by a State commission of any intrastate rate below the interstate rate would be a discrimination.

Mr. WOOD. That is where the two classes of traffic are handled under the same circumstances and conditions.

Senator PITTMAN. That is what I say.

Mr. WOOD. That is where there is no justification for a difference in charge.

Now, mind you, in all of these discrimination cases, whether interstate rates alone are involved, or whether both interstate and intrastate rates are involved, mere discrimination is not enough. The discrimination must be undue; it must be unjust; it must be unjustifiable. In other words, the rates must not be susceptible of rational justification.

My opinion is that where a State rate and an interstate rate are made for the same identical service, or substantially so—substantially for the same service, under the same circumstances and conditions, but are on a different level, where there is no rational justification for a difference in charge made on the one, and on the other there is an undue discrimination against the man who pays the higher rate, whether he be a State shipper or an interstate shipper. There certainly is discrimination because of the treatment he receives, and the man who pays more than his neighbor is discriminated against.

Senator POINDEXTER. That arises under section 13, then, of the act, and the complaint of a shipper that he is discriminated against is different from the complaint or finding of the Interstate Commerce Commission that interstate commerce is discriminated against?

Mr. WOOD. It seems to me, Senator, that the test of discrimination must be the same in both cases, and I have never looked at this matter of a discrimination growing out of a different level in rates as a thing which involves only State commerce as an intangible thing on the one hand and interstate commerce as an intangible thing on the other hand; or the power of a State commission on the one hand and the power of the Interstate Commerce Commission on the other hand; or the revenues derived from interstate commerce on the one hand or the revenues derived from intrastate commerce on the other hand; or revenues arising out of State traffic on the one hand or interstate traffic on the other. All those matters are important considerations, but I have never felt that undue discrimination stopped there. It goes in every case to the person affected.

The CHAIRMAN. I was about to suggest, in following up the thought that Senator Pittman brought to your attention: Suppose you have a class rate in a State under which a commodity is moving within the State, and that no such commodity is moved from outside of the State into the State, would you hold that the mere fact that there was a lower rate within the State than from the outside would establish discrimination?

Mr. WOOD. Well, Mr. Chairman, the hypothetical question that you put is really an impossible one; it does not, in point of fact, exist, and the evidence that was offered before the Interstate Commerce Commission in these cases expressly negatived the possibility of any such situation. In other words, the evidence was that all of those commodities which were moving in State traffic moved in interstate traffic, and they moved on the same general kind of rate adjustment.

The CHAIRMAN. Well, you say that the case is impossible as confined to any particular locality. I do not think it is impossible. For instance, take my own town as an illustration. We move cement rock, for instance, from a point 30 miles outside of the State to a crusher in the State. Now, there is no cement rock moving to Des Moines from outside of the State. It could not affect, as I look at it, interstate commerce in any way. And the fact that cement rock is moved from some point in Ohio to some point outside of Ohio upon a higher rate than was in use in the case I have instanced would not create any discrimination, it would seem to me, unless you are viewing it from a revenue standpoint alone.

Senator PITTMAN. That is exactly the question I was trying to find out, whether he was viewing it from the revenue standpoint alone. If so, I do not see how a State rate could be lower than an interstate rate.

Mr. WOOD. Well, the only thing I can say is that the Interstate Commerce Commission, apparently, did not view it from the standpoint of revenue alone. And in cases such as instanced by Senator Cummins, I would call to the attention of the committee the fact that they were excepted from the decision of the Interstate Commerce Commission.

Now, it must be borne in mind that these cases have to be disposed of in a practical way by the Interstate Commerce Commission, and by the parties, and, as I say, the practice has grown up in State cases, as well as in interstate cases, to try out a general situation, on representative testimony, rather than by dealing with every specific rate, and these cases were tried out on the basis of representative testimony; that is the course that was pursued.

And where issue was joined as to a particular situation, the Interstate Commerce Commission exempted a situation of that kind from its order, unless it appeared that there was such a relation between a rate of that description and the interstate rate as to result in undue discrimination against interstate commerce.

ADEQUACY OF REVENUE AND ITS EQUITABLE DISTRIBUTION FUNDAMENTAL TO ANY LEGISLATIVE PROGRAM.

The CHAIRMAN. I want to give you the things that have most impressed me as we have heard the testimony of the State commissioners and others in that interest. And one of those things is this—and I want you to give some attention to it before you finish, or have somebody give some attention to it. It is said that after Ex parte 74 was decided, and, of course, after the railroad companies had made application to the various State commissions for an increase in rates of the same character, that every State commission in the United States advanced the rates, under the application of the carriers, so far as revenue is concerned, substantially in accordance with the advance which had been made, or ordered, in Ex parte 74, with these exceptions: With regard to those rates—and they were passenger rates mainly, in which the fare had been fixed by statute and over which the State commissions had no control—and with the exception of Nevada and Arizona; so that the revenue which would have been derived by the railroad company under interstate rates as thus established by the State commissions would have been substantially the same as the revenue derived if the level established by the Interstate Commerce Commission were applied to all the States. I have not been able to understand the exigency to which you refer, and the necessity of appealing in a way from the action of the State commissions to the Interstate Commerce Commission.

Mr. WOOD. Well, Senator, if the facts were as they have been represented to you I think you would be right. But the facts are just the contrary. And I am not going to ask the committee to take my word for what the facts are. I expect, in the course of my review of the situation, to put before the committee exactly what each State commission in the United States did, the circumstances under which it did it, and the action which the Interstate Commerce Commission took.

Senator POMERENE. As to passenger or freight rates?

Mr. WOOD. As to both, Senator.

The CHAIRMAN. That is a very interesting point to me.

Mr. WOOD. Now, whatever may be thought of the revenue theory, as applied to a case of undue discrimination technically arising under section 3 or section 13, manifestly Congress in considering the legislative policy of the Nation must take into account the effect of any legislation that is proposed upon the revenues of the carriers, in the aggregate.

Congress, in the passage of the transportation act, undertook to do a statesmanlike job and in my opinion it did it. I do not think anybody, probably, would say that the transportation act is perfect. If any one man could have it all his own way I have no doubt that each of us would change the provisions of the transportation act in some respects. But, taking it as a whole, I do not think there is any doubt but that thoughtful students of the transportation problem believe that the transportation act represented a wise and helpful piece of legislaion on the part of Congress.

And in the passage of that act Congress was profoundly concerned as to the revenues of the carriers, not out of favoritism to the carriers but because the country demanded and required adequate transportation facilities which could only be afforded by adequate revenues. And so I say that Congress, and properly, was profoundly concerned with the adequacy of revenues. The Interstate Commerce Commission, ever since it was established, has been duly mindful of its duties to prevent undue discrimination in rates. In fact, I think I am safe in saying that it was discrimination and the purpose to prevent it rather than exorbitant rates that brought forth the passage of the interstate commerce act in the beginning.

And in the passage of the transportation act Congress sensed what, when you come to deal with any body of rates, are, in point of fact, the two principal parts of which the rate problem consists: Charges which are, in the aggregate, sufficient to support transportation facilities; and an equitable distribution of those charges over the several classes of traffic out of which they accrue, and among the several classes and descriptions of persons who pay them.

When you come to deal with the rates of the United States in the aggregate, under normal conditions and in normal times, over a period of years, those two things make up, to my mind, the rate problem: Adequacy of all revenue and equitable distribution of the charges out of which it accrues.

When you come to deal with individual rates economic considerations arise. Those economic considerations arise in connection with this equitable distribution among the several classes of traffic. They must be examined. They have influenced practically all of the rates there are in the United States to-day.

But taking the rates as a whole; taking the rates problem as a whole, in normal times, and over a period of years, it consists of those two parts: Adequacy of revenue for the preservation of transportation; and an equitable distribution of this revenue among the several classes of traffic. And those are two considerations which should enter into the discussion of any amendments to the rate-making law.

Senator PITTMAN. Take your rates—for instance, the Southern Pacific rate: How many States does your road pass through?

Mr. WOOD. I can not answer that offhand, Senator. I should say about 7 or 8, or maybe 10.

Senator PITTMAN. Seven or eight States?

Mr. WOOD. Yes, sir.

Senator PITTMAN. Now, then, in fixing the rate for that road, the Interstate Commerce Commission would take into consideration your total traffic, would it not, both interstate and intrastate?

Mr. WOOD. In fixing the rates under Ex parte 74, the purpose of which was to produce adequate revenue, in the aggregate, the Interstate Commerce Commission, of course, took into account the entire body of traffic.

Senator PITTMAN. The entire body of traffic?

Mr. WOOD. Both State and interstate. It could not have proceeded in any other way and produce the result required.

Senator PITTMAN. In other words, if there had been no increased charges on intrastate traffic, they would have had to allow you a much higher rate on interstate traffic?

Mr. WOOD. Exactly.

Senator PITTMAN. Now, on the other hand, it is assumed that the Interstate Commerce Commission does not allow any higher rate than is essential to allow you a reasonable compensation; is that not true?

Mr. WOOD. That is a fair presumption.

Senator PITTMAN. Then they did not allow you any higher State rate than is required by your interstate traffic. Then, is it not essential, in your view, in basing it upon the revenues, that the intrastate commerce would have to bear an equal rate, unless the interstate commerce was given a higher rate?

Mr. WOOD. That is my personal view of it, Senator.

Senator PITTMAN. Then, again, I come back to the question. That is your personal view and the Interstate Commerce Commission holds the same view; then it would be futile for a State commission to attempt to fix a rate for intrastate commerce along your line at a less rate than had been fixed in the mind of the Interstate Commerce Commission?

Mr. WOOD. Well, if you will permit me to paint this general picture——

Senator PITTMAN (interposing). Yes; I will.

Mr. WOOD (continuing). Which I am going to try to paint; I think I can fit my answer to your question better into that general picture than I can at this particular point.

What I will say to you now, in answer to that inquiry, is that in the abstract case and theoretically you are no doubt right; but when we consider Ex parte 74, and when we consider the exigencies out of which that case grew, and these various State cases that followed it, we must remember that we were dealing with a very extraordinary condition; we were dealing with a condition in which it was necessary, if the exigency was to be met, that individual rates between A and B, and on individual commodities, had to be lost sight of, very largely. What the situation required was a general advance in the level of all rates above the old prewar level, to that which was required by the circumstances of the moment. It was approached in that way by the Interstate Commerce Commission, and it was approached by the carriers in that way, in their dealings with the State commissions. And, approached in that way, it would seem to be manifest that where the State and interstate rates which were the product of 30 years of regulation of State and interstate commissions, and must presumptively be considered as bearing a proper relation to each other, did not go up in the same proportion, that then an undue discrimination had been created. But, as I say, that was an extraordinary case. Necessarily so. We probably will never have another one like it. And I do not think that there is anything in the law as it stands to-day, in the administration of that law by the Interstate Commerce Commission, as evidenced by its decisions in these cases, and the results of those decisions, which would warrant the assumption that the State commissions to-day are not, as a whole, perfectly free to adjust individual rates within their own borders, or traffic moving within their own borders, to the necessities and requirements of that State commerce. And I shall undertake to demonstrate that a little later, and after I have tried to put before the committee this general picture.

REVENUE EFFECT IMPORTANT CONSIDERATION FOR CONGRESS.

Now, bearing in mind that whatever may be thought of the so-called revenue theory as bearing upon the question of undue discrimination in individual cases, there can be no question, as I said before, that it is a matter with which Congress is profoundly concerned, and has expressed that concern in the terms of the transportation act. And the effect of any proposed amendment upon the revenues or probable future revenues of the carriers will, I take it, receive careful consideration at the hands of the committee when it comes to deal with this matter from the standpoint of broad considerations of public policy, whatever it may think about the application of revenue to discrimination cases.

And so I am going to try, as best I can, to present this matter, first, by showing to the committee what the situation now is; what it would have been if the Interstate Commerce Commission had not exercised the power which it did exercise, and what it would be if the exercise of that power by the Interstate Commerce Commission were withdrawn.

I take it that those are matters which the committee is entitled to know in the determination of this problem, as a matter of public policy, whatever opinion it may have as to the administration of that law in particular cases, or in specific instances.

THE PROBLEM IN 1920.

And in order to put that situation completely and fully before the committee it is necessary to go back to the first proceedings before the Interstate Commerce Commission itself, in Ex parte 74. As I have said, taking any body of rates in the aggregate, except during abnormal conditions, the rate problem consists, to my mind, of two parts: Adequacy of revenue as a whole and equitable distribution of charges among the several classese of traffic. Whether that be true or not, as a general proposition it can not be denied that it is a correct statement of the problem as it existed with the termination of Federal control. Everybody conceded that rates were on too low a level; that if adequate transportation facilities were to be provided they had to be increased. And the question was, How much shall they be increased and by what means? That is to say, How much added revenue is required and in what way shall the added charges necessary to produce it be distributed among the several classes of traffic which constitute the body of traffic as a whole? That was the problem.

RESPONSIBILITY FOR SOLUTION DIVIDED BETWEEN STATE AND INTERSTATE COMMISSION.

It was a problem for the determination of which, or at least for the adequate solution of which, responsibility was divided as between the Interstate Commerce Commission and the State commissions. Whether the revenue theory or revenue feature or the effect of revenue has any place in discrimination cases or not, it was the whole question in the proceedings before the Interstate Commerce Commission in Ex parte 74. It was the primary problem that confronted the country so far as transportation was concerned. It was so recognized.

RATIO OF STATE TO INTERSTATE TRAFFIC.

The former statistician of the Railroad Administration, a man who has had large experience, and prior to that time had large experience in railroad accounting matters, has made a study of traffic figures, and he has informed me——

Senator POMERENE (interposing). What is his name?

Mr. WOOD. Mr. Wettling. He has been before your committee. He was attached, if not officially at least unofficially, to Mr. Chambers's staff during the war. Previous to that time he had been the statistician for certain western lines before the war, and he is now. In the latter position he has made studies of the distribution of traffic on the western lines, and in his connection with Mr. Chambers he made some studies of the country as a whole.

He has stated to me that of the total passenger revenue throughout the country as a whole it is generally assumed or believed, as a result of those studies which he and others have made, that approximately 50 per cent comes from purely State traffic. That conclusion has been reached as a result of analyses made at different times.

Senator PITTMAN. Do I understand that in Ex parte 74 the sole question was a question of revenue?

Mr. WOOD. That was the primary question—How much additional revenue was required? And a secondary question of almost equal importance—or of equal importance in a practical way—was the question of How shall it be raised? Shall it all be put on the freight or shall it all be put on passenger or shall it be put on freight and passenger both, or shall it be put on freght, with a horizontal raise on certain selected commodities? That was a question of secondary importance.

Senator PITTMAN. But that all deals with the question of revenue.

Mr. WOOD. The primary question was, as I think the Senator will recognize, How much added revenue is required for adequacy of transportation?

Senator PITTMAN. Was there any question of service rendered by the railroads taken into consideration.

Mr. WOOD. I don't know that I understand just what the Senator means.

Senator PITTMAN. I have in mind this, and then you will understand me, that the question that is possibly coming before Congress some day is as to whether it is solely a revenue question, or whether the rates are to be based upon the service rendered in a particular case; whether it be passenger or freight, or whether it be a long distance or short distance haul. That is the reason I asked that question.

Mr. WOOD. The latter question, in Ex parte 74, was largely subordinated to the first. There were, however, certain shippers who appeared before the Interstate Commerce Commission and protested that they should be exempt from any horizontal plan of increase that would be established by the commission.

Now, as I say, these estimates are that 50 per cent of the passenger revenue arises from purely State traffic and 15 per cent of the freight revenue arises from State traffic.

JOINT TRIBUNAL OF INTERSTATE AND STATE COMMISSIONERS CREATED TO DECIDE EX PARTE 74.

So the extent of that divided responsibility to the revenues involved, of the State and interstate traffic was easily discernible. Bearing in mind that there was that division of responsibility; bearing in mind also that unless aggregate revenues, as a whole, were produced, that the interests of all the people of all the States would be very largely imperiled through the insolvency of the carriers and a breakdown of transportation; bearing in mind also that the interstate commerce act, as amended by the transportation act, recognized in an

official and formal way the necessity for cooperation between the Interstate Commerce Commission and State commissions, the Interstate Commerce Commission invited the National Association of Railroad Commissioners to select three of its members to sit with the Interstate Commerce Commission in the determination of these questions which were presented by the applications of the carriers in Ex parte 74. Now, manfestly, the Interstate Commerce Commission could not invite the entire membership of 48 State commissions to sit with it in that proceeding. Manifestly it could not create a tribunal consisting of the Interstate Commerce Commission itself and 48 men, one drawn from each State commission in the United States. But it did ask the National Association of Railroad Commissioners, as representing them all, to choose their own representatives to sit with the Interstate Commerce Commission, both in the hearing of the case and in the deliberations and discussions out of which the final conclusions emanated. And those men did sit, and they sat during the entire proceedings.

Senator POINDEXTER. Who were they?

Mr. WOOD. They were Hon. William D. B. Ainey, chairman of the Pennsylvania Public Service Commission; Hon. Royal C. Dunn, member of the Florida Railroad Commission; and Hon. John A. Guiher, member of the Iowa Railroad Commission. That is, there was one from each of the three grand divisions of the country, the south, east and west. They sat throughout the entire proceedings; they participated in the commission's deliberations; they concurred in the conclusions reached, and that concurrence is embodied in a letter—

Senator POINDEXTER (interposing). Did they all concur?

REPORT OF STATE COMMISSIONERS SITTING WITH INTERSTATE COMMERCE COMMISSION.

Mr. WOOD. They all concurred. That concurrence is embodied in a letter which I shall presently ask the privilege of reading into the record. It is a letter making a report of their participation in this case to the president of the National Association of Railway and Utilities Commissioners.

The CHAIRMAN. I think that letter is already in the record.

Mr. BENTON. It is in the record, Mr. Chairman.

Senator POINDEXTER. Is it a long letter?

Mr. WOOD. It is a couple of letter-size pages.

The CHAIRMAN. I am not sure that it is in the record in full, but reference has been made to it.

Senator POINDEXTER. I suggest, Mr. Chairman, that it be read.

The CHAIRMAN. Mr. Wood may read it.

Mr. WOOD (reading):

"National Association of Railway and Utilities Commissioners, Washington, D. C. To Walter A. Shaw, president, National Assoction of Railway and Utilities Commissioners."

Mr. THOM. What is the date of the letter, Mr. Wood?

Mr. WOOD. I do not have the date here. There is no date on the letter. [Reading:]

NATIONAL ASSOCIATION OF
RAILWAY AND UTILITIES COMMISSIONERS,
Washington, D. C.

To WALTER A. SHAW,
President National Association of Railway and Utilities Commissioners:

On May 11, 1920, the Interstate Commerce Commission extended an invitation to the State commissioners to cooperate with it in the consideration of the establishment of rates to carry out the requirements of section 15-a of the Interstate Commerce Act, expressing the desire that three State commissioners be selected as representatives of all State commissions. Afterwards at a called meeting of your association we were selected as such representatives. We wish to report as follows:

"On May 24, 1920"—

That was the date when the hearings began. [Reading:]

"On May 24, 1920, we presented ourselves to the members of the commission who recognized us as State commissioners whom they desired to act with them in cooperation in the examination and consideration of said advanced rate hearing, being I. C. C. Ex parte 74. The taking of the testimony began on May 24, and was completed on July 1. The arguments followed immediately, closing July 6. An adjournment was then taken until July 13 to enable the commission to perform other official duties requiring im-

mediate attention. During the taking of the testimony and the arguments we sat with the commission.

"Consideration of the case in conference began July 13 and ended July 29, when the conclusions were reached and the ruling completed. Between the dates just stated the entire commission devoted each day to the consideration of this case, except one and one-half days in the hearing of arguments in other cases. We participated in the conference in the same manner as members of the commission, being invited by them to take part in the discussions and express our views with full freedom.

"The members of the commission gave to the case intense and efficient application, examining and discussing it with the evident desire to reach correct conclusions and apply the increase in such manner as to deal justly with the whole country.

"The questions presented were very numerous, involving the commerce of the whole country, and the entire rail transportation system of the United States, many of these questions being of complex character. Any decision of the case looking to the observance of the statute affects in some way every rate now effective. Speaking generally, every controverted question concerning all classes and commodities, and all rates, rules, and practices of rail carriers, and all the theories of shippers and carriers were presented and urged in the testimony and in argument before the commission and given careful consideration in conference.

"The commissioners were not of one mind on all questions, and their conclusion in many cases was the result of recognizing that the views of the other man must be taken into account, and that there must be some surrender by each before an agreement could be reached. In some instances the conclusion of the majority is the view expressed in the ruling. On some of the questions our views were not in full accord with the majority and in some instances we three State commissioners did not have unity of view. However, when all matters are considered, and remembering that where 13 men"—

The significance of the 13 is that it was made up of the 10 Interstate Commerce Commissioners, and the three State commissioners, there being one vacancy at that time on the Interstate Commerce Commission. [Continuing reading:]

"However, when all matters are considered, and remembering that where 13 men are considering controverted questions and proposed policies, their differences of opinion must be composed or decided by the majority, we believe that the conclusion, considering all things, is just and fair, and we give it our approval.

"The increased rates permitted under the ruling in Ex parte 74 will probably go into effect September 1, 1920. The reasons requiring an increase of interstate rates are very persuasive of the need for increase in intrastate rates. The operating revenues of the railroads under present rates and conditions are recognized by all persons as insufficient. A part of the responsibility to meet the situation rests upon the State commissions. Such increases as will be made in intrastate rates should, if possible, be made effective September 1, 1920.

"Respectfully submitted.

"WILLIAM D. B. AINEY,
"*Chairman Public Service Commission, Pennsylvania.*
"ROYAL C. DUNN,
"*Member Florida Railroad Commission.*
"JOHN A. GUIHER,
"*Member Iowa Railroad Commission.*

"WASHINGTON, D. C., *July 29, 1920.*"

That is signed by the three members of the State commissions who sat as the chosen representatives of the National Association of Railway and Utilities Commissioners with the Interstate Commerce Commission in the determination of this case.

Senator POMERENE. That was evidently written before the order in Ex parte 74 went into effect. You are not able to give the date?

Mr. THOM. It accompanied the announcement by the Interstate Commerce Commission.

Mr. WOOD. That relates to the order of the Interstate Commerce Commission and the decision as released by that body.

Mr. BENTON. Mr. Chairman, in order that the record may not be left incomplete, may I correct a statement that I have made?

The CHAIRMAN. Certainly.

Mr. BENTON. I find that what is in the record, on page 21, is merely the conclusion and recommendation of those three men.

The CHAIRMAN. I had forgotten whether it was in in full or not.

Mr. BENTON. Evidently not.

Mr. THOM. It will be in now, Mr. Chairman, however?

The CHAIRMAN. Certainly.

EX PARTE 74 SIGNIFICANCE OF STATE COMMISSIONERS' CONCURRENCE AS TO REVENUE REQUIREMENTS.

Mr. WOOD. Now, that is a most significant document, in my opinion. On its face it represents the concurrence of the State commissions in the general plan which was put forth by the Interstate Commerce Commission in Ex parte 74. On its face it makes plain that that decision was as much the decision of those State commissioners sitting in a representative capacity, as it was the decision of the Interstate Commerce itself.

Senator PITTMAN. But, Mr. Wood, that did not attempt to deal with intrastate rates, did it?

Mr. WOOD. No, sir. The significance of that concurrence, as applied to the State rates, is made even more plain when the character of the evidence and the nature of the issues presented to the Interstate Commerce Commission, or to this joint tribunal of the Interstate Commerce Commission and these three State commissioners is considered.

The first question that the joint tribunal had to decide was how much increased revenue, in the aggregate, should be raised. There was a mass of statistical testimony offered by the carriers on that subject. There was a mass of statistical testimony offered by various shipping organizations controverting, in some respects, the calculations which the carriers had made. There was a vast amount of oral testimony dealing with the situation; operating conditions; operating costs; probable increases or decreases in the operating costs; possible increases or decreases in the traffic; every fact, circumstance, and figure bearing upon this primary question as to how much revenue must be raised in order to make a total revenue sufficient for the production of adequate transportation was there and in evidence.

The statisticians of the Interstate Commerce Commission critically examined all of this evidence as it went in and after it went in. They, and the members of the tribunal itself, from time to time put specific inquiries to the carriers calling for explanations of certain matters that appeared on those statistical exhibits; calling for additional information which the carriers themselves had not offered. If any effort was ever made by any tribunal to ascertain all the facts pertaining to the revenue requirements of any industry, that effort was made by this joint tribunal consisting of the Interstate Commerce Commission and the three State commissioners.

And their conclusions were not the affixing of a rubber stamp handed them by the railroads. In point of fact, their conclusion resulted in a less advance than that established by the evidence of the railroads. These conclusions were after an analysis of all this testimony by their own experts, after the production of every fact and figure which any member of that joint tribunal believed to be pertinent to the inquiry.

So the approval of that joint tribunal was first an approval of the revenue requirements of the carriers.

Now, these revenue requirements were predicated, and they could only be predicated upon a consideration of the traffic as a whole, State and interstate.

Senator POMERENE. Did you take part in those hearings?

Mr. WOOD. Yes; throughout.

Senator POMERENE. You were present throughout all the hearings?

Mr. WOOD. Yes, sir.

Senator POMERENE. Was there any discussion as to what effect these rates would have on the amount of traffic?

Mr. WOOD. That question was discussed; yes, sir.

These requirements, as found by this joint tribunal, were predicated, and could only be predicated, upon a consideration of the traffic as a whole under State and interstate rates. There were a number of reasons for that. In the first place, it was the only practicable way. The distribution as between State and interstate, and the calculation of the amount of revenue required from each,

is almost an impossible process when you are dealing with all the railroads of the country as a whole.

In the second place, the requirements of the situation affected all classes of traffic alike. The necessity was for a new level of rates which met the new level of costs and the requirements of the carriers for the purpose of maintaining their credit. That was a condition that affected State rates as well as interstate rates; it affected State shippers as well as interstate shippers, and a situation without which these State shippers would suffer as well as the interstate shippers.

So that, for a variety of reasons which I might name, that was the only logical way in which the requirements could be determined.

So those are the percentages of advance which the Interstate Commerce Commission said were necessary to produce this revenue and in which these three State commissioners concurred; it was a result in which they jointly concurred and which they said was necessary, and the conclusions applied to State and interstate alike.

Now, that is the first significant thing to be borne in mind when the concurrence of these three State commissioners is there considered.

Senator PITTMAN. That is coming back again to what I said before—that it would have been a discrimination if the State rates had not been advanced proportionately.

Mr. WOOD. I think it would have been.

Senator PITTMAN. Then what discretion has the State commission left in the matter?

Mr. WOOD. A very great deal, Senator, as I will illustrate by dealing with the duties of the State commissions under the law as it now stands.

Senator PITTMAN. All right.

EX PARTE 74 SIGNIFICANCE OF STATE COMMISSIONERS' CONCURRENCE AS TO METHOD OF OBTAINING INCREASED REVENUES.

Mr. WOOD. Now, the second significant thing to be borne in mind in assessing the relation which the concurrence of these State commissioners had to these subsequent proceedings is this: While the primary question in Ex parte 74 was, How much revenue shall be raised? the second question of almost equal importance was, How shall it be raised? Shall it be raised by advancing freight charges only, or by advancing passenger charges only, or shall it be raised by advancing both? And when we come to freight traffic the question was, Shall it be raised by horizontal increases of all freight rates within a given rate group uniformly on all descriptions of freight traffic, or shall it be raised by a process of selection among the several classes of freight traffic, as a result of which certain commodities would be advanced greater than others, and certain commodities might conceivably be relieved from any advances altogether. That was the secondary question.

There was a large amount of evidence offered to the Interstate Commerce Commission upon that question. The proponents of these various possible means of raising this amount of revenue, after the amount was determined, presented their views fully to the Interstate Commerce Commission and presented the evidence upon which those views were based.

The proposal of the carriers was that there should be a 20 per cent advance in standard passenger fares, the imposition of a Pullman surcharge and horizontal advances in freight rates, uniform in their application in each of the several groups; that is to say, under that plan the percentage of freight rates varied as among the groups themselves, because the necessities of the groups were not the same, and the Interstate Commerce Commission had seen fit to divide the country into groups instead of taking it as a whole. But as to each group the proposal of the carriers was that there should be a horizontal increase of every freight rate within that group.

Senator SMITH. What per cent of the total revenues of the railroads is derived from the passenger service?

The CHAIRMAN. It is about one-third—from the passenger fares.

Senator SMITH. Of the total revenue?

Mr. WOOD. I thought I had those figures with me, Senator. I see I do not. I will look it up and give you a specific answer to the question.

Senator SMITH. The significance of the question is that you stated a moment ago that 50 per cent of the passenger revenue was wholly intrastate revenue.

Mr. WOOD. Yes, sir.

Senator SMITH. And that being wholly within the jurisdiction of the State commissions would affect 50 per cent of the one-third, if the chairman is correct.

The CHAIRMAN. That is my recollection.

Mr. WOOD. I think the Senator's estimate is a little high, but I will get the exact figures.

Senator SMITH. That is very significant—to know what per cent of the total revenues of the roads are within the control of the State commissions.

Mr. WOOD. I will try to have that in the record to-morrow. I think Senator Cummins's estimate is a little high. I do not think it reaches quite one-third.

The CHAIRMAN. It may be a little high, but that is my recollection. It is somewhere along there.

Mr. WOOD. Somewhere along there; yes, sir.

Senator SMITH. You said the passenger revenue was 50 per cent and the freight 15 per cent within the control of the States?

Mr. WOOD. Yes, sir.

Senator POMERENE. Let me ask you another question there before you go on: You just said there was a horizontal increase in those freight rates?

Mr. WOOD. Yes, sir.

Senator POMERENE. In these several groups, as I understood it?

Mr. WOOD. Yes, sir.

Senator POMERENE. I think it has been pretty clearly demonstrated before this committee in our various hearings that one of the very serious causes of complaint made after the director general had raised the rates and had given out that there was a 25 per cent increase was that, as a matter of fact, the reclassification of traffic was veryl material, and as a result, while the public was advised there was a 25 per cent increase, there was, in fact, a 50 to 60 per cent increase, due to the reclassifications. Now, when the Interstate Commerce Commission made this horizontal increase of traffic rates was it based upon the reclassification of rates as made by the director general or was it on the classification as it had existed before?

Mr. WOOD. It was applied to the rates as they stood at the termination of Federal control. Whatever changes had been made by the director general and were reflected in rates as they stood were reflected with the horizontal raise.

Senator POMERENE. So that whatever inequalities or inequities had been brought about by the director general were continued?

Mr. WOOD. If there were inequities; yes. Of course, the Senator will bear in mind that all those questions are questions upon which many people differ.

Now, I was going on to outline the attitude of the various parties before the Interstate Commerce Commission on this matter.

Senator POMERENE. I wanted your view. You have answered my question in that hypothetical way, assuming I was correct. What is your statement as to whether or not that complaint was correct and the justification for it, if it is correct?

Mr. WOOD. You mean whether the director general's traffic rates resulted in inequities?

Senator POMERENE. Yes.

Mr. WOOD. I think in many cases they did and in many cases they did not. I do not think, on the whole, the director general's advances can be properly criticized in the way in which they were spread over the traffic.

Senator POMERENE. Let me give you a concrete case: It was stated, of course, that the increase was 25 per cent, a horizontal increase, but when it came to the rough grains in the Middle West we were advised that the increase was 50 to 60 per cent.

Mr. WOOD. I am not familiar with the grain situation. The Southern Pacific is not much of a grain-carrying line. I have some general information about it, but would not want to speak authoritatively. But my understanding of the situation and my recollection of the general situation and of General Order No. 28 is this: That it provided for a general advance of 25 per cent of all rates as they then stood, with the exception of certain commodities, on which and as to which the advances were to be made in specific cents per 100 pounds, irrespective of what the rates were before.

Now, the effect of this substitution as to those excepted commodities—what effect that would have upon the percentage of advance depended generally upon whether you were talking about long-haul traffic or short-haul traffic. I think in every case the increases upon those excepted commodities were less than 25 per cent on long-haul traffic when the previously existing rate was a relatively

high one, and more than 25 per cent on short-haul traffic when the previously existing rate was a relatively low one.

That is my general recollection of General Order No. 28.

What other readjustments the Railroad Administration made in the ordinary course of business I am not advised and can not say.

Senator POMERENE. I simply wanted to call your attention to this fact: That notwithstanding the Congress had created the Interstate Commerce Commission, whose business it was to classify rates, the director general saw fit to get his own rate-making body to fix these rates, and much of the onus and the criticism of the Interstate Commerce Commission now is due to what was done by that committee.

Mr. WOOD. Well, I think there is no doubt that a good deal of the criticism, to the extent there is criticism, of the existing rates goes right back to the rates that were created during that period. In order that my statement as to the proposal of the carriers be entirely correct, I should have said that the original proposal of the carriers did not contemplate any advance in passenger rates at all. When the award of the Labor Board was handed down increasing the wages of the men, then the carriers proposed that the increased requirements due to that award should be provided for by making this 20 per cent advance in standard fares and the imposition of a Pullman surcharge, and the remainder of the raise should be placed on the freight traffic. So that when you speak of the Ex parte 74 proceeding, its finality, the ultimate proposals were as I have described them. When you speak of the original proposals, they did not contemplate an advance in the passenger rates at all.

The CHAIRMAN. It will be necessary for us to suspend at this point, and the committee will take a recess until 9 o'clock to-morrow morning, if it is satisfactory to the committee. And all those who are yet to appear, I want them to condense just as much as it is possible, consistent with an intelligent presentation of the matter, what they have to say, because we must bring this hearing to a close this week.

Mr. THOM. Mr. Chairman, I hardly believe you will be able to do that, from the number of witnesses that are yet to come; I do not think that that will be practicable.

The CHAIRMAN. We are going to try to do it. I do not know whether we will succeed or not.

(Whereupon, at 12 o'clock m., the committee adjourned until November 15, at 9 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

TUESDAY, NOVEMBER 15, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. Gentlemen, we will go on with this hearing, at least for a limited time.

Mr. Wood, you may take the stand again.

STATEMENT OF MR. FREDERICK H. WOOD—Resumed.

EX PARTE 74 SIGNIFICANCE OF STATE COMMISSIONERS' CONCURRENCE FURTHER REVIEWED.

Mr. WOOD. Just before the adjournment on yesterday I had read into the record, at a suggestion from Senator Poindexter, the report made by the three chosen representatives of the State railroad commissions who sat with the Interstate Commerce Commission in the determination of the advance rate case, commonly known as Ex parte 74. I was asked for the date of that letter, which is at the bottom of the letter, instead of the top, which accounted for my failure to find it at that particular moment. The report of those three State commissioners was dated at Washington, July 29, 1920, which is the same day on which the opinion of the Interstate Commerce Commission, in which those three State commissioners participated and expressed their opinion, was released.

In connection with that letter I was undertaking to state certain conclusions which I will not restate, except to the extent that is necessary to pick up the thread of my discussion on yesterday.

The first conclusion was that by their concurrence in the findings of the Interstate Commerce Commission, or rather in the findings of the joint tribunal of which they were a part, as to the extent of added revenue required by the railroads, it necessarily followed that their recommendations and conclusions could not be made effective unless the same advances were made in the State rates that were made in the interstate rates, because that finding, as to the additional amount of revenue required, was based upon a consideration of the traffic situation as a whole—the volume of the traffic as a whole—both State and interstate.

As to the necessity for a general advance in rates, as a part of the history of the proceedings leading up to it, I probably should have said that the necessity for a general advance in rates was not only recognized by these State commissioners in this report of theirs, but it was recognized and advocated by all the shippers and shipping organizations which appeared before the Interstate Commerce Commission. As I remember it there was only one witness who appeared before the Interstate Commerce Commission who took the position that the exigency of the situation did not require a general advance in transportation charges, and that was Chairman Shaughnessy, of the Nevada Railroad Commission. With that exception, I think, although there may have been other exceptions that have escaped my memory for the moment, the universal opinion of all the witnesses who appeared was that such a general advance in transportation charges was required.

Now, the second significance of this report of those three chosen representatives of the State commissions, in so far as it related to interstate rates, grows

out of the issue presented to the Interstate Commerce Commission as to the manner in which the aggregate revenue which was found to be necessary should be raised. As I stated yesterday in leading up to this point, manifestly it might have been raised in three different ways, or at least in two different ways: It might have been raised by the application of horizontal percentages of advance to all rates as they then existed; it might have been raised by a process of selection under which, taking into account the volume of traffic moving under the several descriptions of traffic, certain percentages of advance might have been applied to certain freight commodities and certain other advances might have been applied to certain other freight commodities, and it is conceivable that as to certain freight commodities they might have been relieved from any advances altogether. The application might have been made as to certain commodities constituting the greater amount of traffic in flat percentages, and in cents per hundred pounds as to other portions of the traffic. Each one of those several methods of accomplishing the necessary results were fully discussed before the Interstate Commerce Commission, and each one had its proponents and adherents.

The contention of the carriers was that it should be done by the making of the horizontal advances to be applied to all traffic alike. That is, while percentage of advance suggested ultimately for passenger traffic was somewhat different from that suggested for freight traffic, that all rates of like kind should go up in uniform percentages and that each one of the freight groups should go up in a uniform percentage.

THE ONLY PRACTICABLE METHOD.

And the reasons back of that suggestion were several. I shall not undertake to state them all.

In the first place, on September 1 the Government guaranty would expire. The railraods would then be on their own resources; they would have to pay their interest charges and all their bills out of their own net earnings. I do not need to state to the members of this committee what those net earnings were nor the necessity for prompt action. Manifestly it would have been almost impossible, when the multitude of transactions involved in the railroad business are concerned, the multitude and thousand of commodities that are involved and the hundreds of railroads, to have made anything like an accurate calculation of the results of making those advances by a process of selection. It would have been but the merest guess.

The carriers felt that the fundamental and primary requirement of the situation was an advance in those rates which would bring to them the necessary revenue, and that could not be brought about in any practicable way by this method of selection.

ALL RATES PRESUMPTIVELY FAIRLY RELATED.

Another reason assigned was this: The original case before the Interstate Commerce Commission manifestly was essentially and almost entirely a revenue case. It was predicated upon the fact that with the disappearance of the prewar levels of costs the prewar level of rates must disappear also, and that it was essential that a new level of rates adjusted to the conditions as they then existed should take its place.

We had had more than a generation of regulation of common carriers by the State and Interstate Commerce Commissions, and during that time a large portion of the rates had been made, in point of fact, absolutely by either the State commissions or the Interstate Commerce Commission, and the remainder of those rates had been suffered to remain in effect without attack and without action by those commissions. The question of the relation of rates during all this period had been a matter of as much importance to the public, of as much concern to the carriers, and of as much consideration on the part of those various commissioners as the rates themselves. And we felt that it was a fair presumption that the relation of those rates as between themselves was correct at that time; that it was the product of those many years of adjustment to meet the economic conditions, was the result of decisions by these commissions, and that, presumptively, those rates were properly related to each other.

Of course, that is not a conclusive presumption. You can not say at any time that even two rates in any body of rates, or in the entire body of rates, are properly related to each other. If so, there would be very little occasion for

the existence of these commissions. But taking it by and large, we believed—and I believe now—that it is a fair presumption that those rates were properly related to each other and that they represented the prewar level of costs and represented the prewar economic conditions.

And so we felt that, when the exigency of the situation required a general advance in rates, not only the practical way to secure that result was by these horizontal advances, but that that was, in point of fact, the fairest way to distribute the necessary advances among the several classes of traffic; that if we did not do that we were going to disturb those relations that existed before, and we were just as liable to make mistakes as to do justice to the several classes of traffic which might be treated somewhat differently.

In addition to that, Mr. Thom suggests that during Federal control the President, by proclamation or order, accompanied by the necessary certificate to the Interstate Commerce Commission, under the Federal control act, had fixed all these rates, State and interstate, by the application of a given scheme of advance, in order to bring them up to what then seemed to be the requirements of the increased costs, but which experience demonstrated was not sufficient to keep pace with the constantly mounting costs.

And so, for those reasons, our proposals contemplated these horizontal advances in the rates.

Our proposal also contemplated that after that had been done, any inequities that might result from that situaion should be ironed out by the Interstate Commerce Commission, and we, ourselves, suggested to the Interstate Commerce Commission, at the conclusion of the hearing, that the Interstate Commerce Comission should keep its docket in Ex parte 74 open for that precise purpose, so that it might not be necessary to go elsewhere to obtain an adjustment of any inequities that might have resulted from this scheme that we had proposed. And that plan was based upon the considerations which I have stated.

ISSUE AS TO METHOD FULLY PRESENTED.

Manifestly there were shipping interests which felt that they ought to pay a somewhat less proportion of the advances than were to be assumed by others. And, in point of fact, I may say that the carriers, having stated these general considerations which I have stated here, and having given their reasons for their proposals, practically stepped aside, so far as the question of method was concerned, and let that matter be fought out by the representatives of the shippers themselves, some of whom advocated one method and some of whom advocated another. But there was a sharp issue joined over the method by which the aggregate revenue required should be obtained.

And that issue was secondary, in a measure, of course, to what was the primary purpose of the case, but it was equally vital to the case itself, and the issues there were between the representatives of the shipping interests.

RELATION OF STATE COMMISSIONERS' CONCURRENCE IN JOINT TRIBUNAL'S FINDINGS TO SUBSEQUENT CASES.

The Interstate Commerce Commission very carefully considered all of that. It was very fully presented on all sides, and they reached the conclusion that the horizontal method was the method which should be pursued. And in that conclusion these three State commissioners, as evidenced in their letter, representing officially the National Association of Railroad Commissioners, one from the East, one from the West, and one from the South, concurred.

Now, the significance of that concurrence, as it would seem to me, is this: That in order that the recommendations of this joint tribunal should be made effective it was not only essential that the State rates should be increased to the same relative amount, in the aggregate, as compared with the previous State rates, as the interstate rates, but that unless inequities and injustice were to result that it should be done by the same method. In other words, these State commissioners having concurred in the view that this necessary increased revenue should not be obtained by a process of selection as among several classes of traffic, but should be obtained by the horizontal advance method, it seems to me it naturally followed that the advances in the State rates should, at least presumptively, be made in the same way. Certainly there is no reason why the State traffic should be exempted altogether and

the horizontal advances be placed upon the interstate traffic alone. And if the interstate rates were to go up by this horizontal method it would appear that, presumptively, at least, the same method should be applied to the State business. The same reasons existed in both cases.

The CHAIRMAN. You do not suggest that the presence of those three State commissioners with the Interstate Commerce Commission bound the various State commissions?

Mr. WOOD. No, sir; I think it is very clear that they did not. But I do think that, when it is remembered that these three State commissioners were the chosen representatives of the National Association of Railway Commissioners itself, put there for the purpose, so far as possible, of making the determination one that represented not only National but State authority, that their conclusions must be persuasive as to the proper method of disposing of these same questions in the States. Of course, they did not bind anybody; they could not bind anybody.

The CHAIRMAN. I hope you will bear in mind all the time that we are not reviewing the propriety or wisdom of the act of the Interstate Commerce Commission in increasing the interstate rates. That is not the question before us at all. The question is whether we shall modify this law so as to give the State commissioners broader authority, as it is alleged by the railroads that they now have under the transportation act of 1920.

Mr. WOOD. I appreciate that Senator, and I have only reviewed these proceedings before the Interstate Commerce Commission in the way that I have—and I am through with that review now so far as ex parte 74 is concerned—because it does seem to me that the nature of those proceedings, the questions presented to the commission and the manner of their determination, must have some bearing upon what should be done.

The CHAIRMAN. We know of the cooperation between the State commissioners and the Interstate Commerce Commission, and I am glad to see every cooperation between the States and the Interstate Commerce Commission; but with all due deference, I do not see that it has anything to do with the question we are now to determine.

Mr. WOOD. Well, I think that matter will be more evident when I come to the point that I have reached now, viz, a discussion of the action which the railroads themselves took before the State commissions.

The CHAIRMAN. That is what we have been wanting to hear all the time.

Mr. WOOD. Because that action I do not think can be properly understood, unless it is understood also what was done before the Interstate Commerce Commission in this proceeding. I think that matter, as to what was done before the Interstate Commerce Commission, should also be understood.

GENERAL NATURE OF PROCEEDINGS BEFORE STATE COMMISSIONS.

It has been suggested that in the various proceedings before the State commissions, which were heard following the opinion of the Interstate Commerce Commission in Ex parte 74, that the carriers acted in a disrespectful manner toward the State commissions. It has even been suggested that they did not act in good faith. It has even been suggested, by inference, at least, that there was some sort of conspiracy between the carriers and the Interstate Commerce Commission to handle those cases in such a way as to oust the State commissions from control and to concentrate authority here in Washington.

Nothing could be further from the truth; and that nothing could be further from the truth is evidenced by the manner in which the railroads presented these cases to the State commissions—that is, the cases which preceded the action of the Interstate Commerce Commission.

From the very outset the carriers took the various State commissions completely into their confidence, and undertook in every way to bring about what they regarded as the necessary cooperation of all parties concerned in the solution of the problem.

In the spring of 1920 and at about the same time that application was made to the Interstate Commerce Commission for an advance in State and interstate rates, similar applications were made to the State commissions. And those applications were based upon the same grounds, viz, the necessity for an increase in revenue, if adequate transportation facilities were to be provided. I have here a draft of a petition, which was the form used by the western carriers as the basis of those applications, subject only to such modifications

as were required by the procedure in the several States. The applications made to the State commissions in the East and in the South were along the same general lines. In that application, as I say, the necessity for increased revenues——

The CHAIRMAN (interposing). Is that in writing? Do you intend to read it into the record?

Mr. WOOD. I was going to read it into the record; yes, sir.

The CHAIRMAN. Very well.

Mr. WOOD. In that application we pointed out the necessity for sufficient revenue, and we also pointed out the manifest fact that, at least generally speaking, unless there was harmonious action between the States there would be numerous cases where countless discriminations against interstate commerce would be created. We asked the State commissions to institute an appropriate inquiry for the purpose of so adjusting the rates on the State traffic as to bring the same into harmony with such readjustment of rates as might be made by the Interstate Commerce Commission in the proceeding and respectfully suggested, so far as consistent with the authority of the State commissions, that the same be heard on a common record by the Interstate Commerce Commission and the State commissions.

The CHAIRMAN. That was before Ex parte 74 was decided?

Mr. WOOD. Yes, sir; we suggested that the same be heard on a common record by the Interstate Commerce Commission and the State commissions. Now, that was our proposal to the State commissions of the West: That, so far as consistent with their practice, they decide this question within the scope of their authority on a common record with that presented to the Interstate Commerce Commission.

Those applications were filed very shortly before, or some time before, or some time after the actual taking of testimony in Ex parte 74 began. The dates were different in the different States, but they were seasonably filed, and practically coincident with the filing of similar applications with the Interstate Commerce Commission.

EVIDENCE IN PROCEEDINGS BEFORE STATE COMMISSIONS.

Senator POMERENE. Let me ask you there: Now, you say your proposal was that those questions be decided on a common record; did the different State commissions have a hand or a voice in the making of this record that you speak of, or were they to have?

Mr. WOOD. Not individually. Those three members of the State commissions who sat with the Interstate Commerce Commission did have, and I am going to elaborate at this very point on just what we contemplated by this proposal, and just what we did under it.

The day before the hearing in Ex parte 74 began, President Donnelly, of the Northern Pacific, and myself, representing the western lines, and as it afterwards turned out, as emissaries of all the lines, east, west, and south, had an interview with Mr. Benton, at his solicitation, at which he suggested that the railroads should furnish to each of those State commissions a copy of the proceedings before the Interstate Commerce Commission, and also a copy for his own use.

Mr. THOM. The joint meeting of the three State commissioners and the Interstate Commerce Commission.

Mr. WOOD. Yes; the proceedings before the Interstate Commerce Commission and these three chosen representatives of the State commissions.

We very gladly acceded to that request, and in point of fact, it was in line with what we had in mind in suggesting that so far as consistent with the practice of those various commissions, the matter be determined upon a common record. We felt, as I said before, that both before the State commissions and before the Interstate Commerce Commission the primary, and even the secondary questions, were really the same: How much money is needed in the several groups as established by the act of Congress? What are the conditions in these several groups, and how should that money be raised? That was the issue before the Interstate Commerce Commission; it was the issue before the State commissions. We felt that every conceivable fact bearing upon either one of those issues would be presented to the Interstate Commerce Commission in this proceeding which it, with the help of these three State commissioners, was conducting; and that it would serve no good purpose to offer orally all of that evidence over again before each of those State com-

missions, and that, in point of fact, we could not, in any one State case, make the same comprehensive showing before that commission and then the various members of the public offering evidence, could not make the same comprehensive showing in each of the cases before the State commissions as would be made in the case before the Interstate Commerce Commission.

And so, as a result of this arrangement with Mr. Benton, we furnished to each railroad commission a transcript of the proceedings before the Interstate Commerce Commission at a cost of something like $35,000.

The reporters for the Interstate Commerce Commission in that proceeding got out daily copy. That is to say, instead of waiting until the thing was all over and furnishing the transcript as a whole, they had ready every morning the transcript of the testimony that had been offered the day before. The exhibits were sometimes somewhat delayed and did not come along for a few days after the transcript was delivered, because there was more difficulty in duplicating the exhibits than there was in transcribing the oral testimony. But they were never delayed over a week beyond the time when the testimony which accompanied the exhibits was delivered. That copy, therefore, went out each day to every State commission in the United States. That enabled the members of those State commissions who were interested—and presumably all of them were interested in the proceedings that were going on—to follow those proceedings just as closely as if they had been in Washington. Some of them had their representatives in Washington, but most of them did not, but wherever they were received, each day, a copy of all the evidence offered before the Interstate Commerce Commission, and, as I say, at least within a few days, or at the most a week, a copy of the exhibits which were filed by the carriers or by other parties. They were, therefore, kept in touch with the situation as it proceeded, as quickly as it proceeded, and to the same extent that they would have been in touch with it if they had been present here.

We felt that by that means we had in reality put the State commissions, in advance of any formal hearings before their own tribunals, in possession of every fact and circumstance which we believed to be material to a determination of the issue before the State commissions, and every fundamental issue presented by any shipping interest or any other interest representing the public, for any observations that they had to make upon any of those questions that must be decided under the divided responsibility that existed and which rested both upon the Interstate Commerce Commission and the State commissions. To what extent the State commissions followed those proceedings in detail as they went along, of course, I do not know.

The CHAIRMAN. Nor is it material.

Mr. WOOD. Nor is it material.

The CHAIRMAN. And so do not dwell upon that.

Mr. WOOD. Thereafter those proceedings came on for formal hearing before the several State commissions, and with the exception of, I think, a maximum of three States, those proceedings before the Interstate Commerce Commission and the transcript of testimony and all of the exhibits which had been offered before the Interstate Commerce Commission were offered by the carriers and admitted of record by the State commissions as a part of the record before them. And that is the sort of procedure that we had in mind when we suggested originally that the matter be heard, so far as consistent with that practice, upon a common record.

EFFECT OF WAGE AWARD—SUPPLEMENTAL PETITIONS.

Before these formal proceedings before the State commissions took place, however, the carriers filed a supplemental petition in each of the western States, at least, and I am quite certain they did it in all of the States in the East and in the South. And that supplemental petition was due to the award of the Labor Board. Our original petitions had been predicated upon the situation as it existed before the Labor Board made this award. Our supplemental petition, while filed before the award of the Labor Board was announced, was filed after it was announced that the award would be made on July 20, and it was made, therefore, in view of the coming award and to meet the situation as it would be when the State commissions came to act.

And there again we asked that they make advances of the State rates in harmony with those authorized by the Interstate Commerce Commission. In filing this supplemental petition with the several State commissions and at the

time of filing it, the taking of oral testimony in Ex parte 74 had been concluded, and we, therefore, were in position to present formally and by pleading a little more definitely certain conditions which that record disclosed were present. And we set forth, in these supplemental petitions which we filed with the State commissions, that the records in that case showed that without any regard as to what the award of the Labor Board might be, that the evidence before the Interstate Commerce Commission showed that the lines in the West were earning at a rate which, if continued throughout the year, would be insufficient to enable them to pay their interest charges, and that that situation would, of course, be greatly aggravated by the decision of the Labor Board when it came out.

I would like now, Mr. Chairman, to read into the record, if I may, the original petition and the supplemental petition which were filed by each of the railroads in the West, with the several State commissions in the West.

FORM OF PETITIONS TO STATE COMMISSIONERS.

The CHAIRMAN. The petitions may be read into the record.

Mr. WOOD [reading:]

"The undersigned railroads engaged in the conduct of State and interstate transportation in the State of ——— respectifully show that the act of Congress known as the transportation act, 1920, provides that for the two years beginning March 1, 1920, the net railway operating income of the carriers as a whole, or of the carriers as a whole in each of such groups as the Interstate Commerce Commission may designate, shall equal a fair return upon the aggregate value of their railway properties held for and used in the service of transportation, as determined by the Interstate Commerce Commission.

"Your petitioners further show that the railroads in western classification territory have filed with the Interstate Commerce Commission their application, copy of which is hereto attached, asking the Interstate Commerce Commission to enter upon an investigation under section 422 of the said act, and to initiate or authorize increases in freight rates in western classification territory as a whole, which will average not less than 23.91 per cent, which the petitioners allege is necessary in order to provide a fair return, as defined in said act, upon the value of said properties in said group.

"Your petitioners further allege that the said act prohibits and makes unlawful discrimination of every character, including discrimination against interstate commerce, and that to avoid such discrimination, and likewise to carry out the purposes of said act with respect to the net railway operating income of the carriers, it is necessary that uniform advances be made on State and interstate traffic. Said act also provides for cooperation between the State and interstate commissions for the purposes of bringing State and interstate rates into harmony.

"Wherefore, petitioners pray that this honorable commission institute an appropriate inquiry for the purpose of so readjusting rates on State traffic as to bring the same into harmony with such readjustment of rates as may be made by the Interstate Commerce Commission in the proceeding aforesaid and respectfully suggests, so far as consistent with the authority of this commission, that the same be heard as a common record by the Interstate Commerce Commission and this commission."

"SUPPLEMENTAL PETITION. IN THE MATTER OF INCREASES IN REVENUES OF RAILROADS IN WESTERN CLASSIFICATION TERRITORY.

"Supplementing the petition heretofore filed with your honorable body the undersigned railroads, engaged in the conduct of State and interstate transportation in the State of , respectively show that since filing said application herein applications have been made by railroad labor organizations to the Railroad Labor Board, created by the act of Congress approved February 29, 1920, known as the transportation act, for increases in the wages of practically all classes of railway employees and that it is now anticipated that a decision will be made by said Railroad Labor Board on or before the 20th of July, 1920. In the event that such decision increases such wages and if the Interstate Commerce Commission shall allow additional increases in freight rates or passenger fares necessary to meet such wage increases, then the undersigned carriers do hereby apply to your commission for authority to make

corresponding increases in the intrastate freight rates and passenger fares applicable to the State of ———.

"Petitioners further state that while the hearings before the Interstate Commerce Commission have been completed, it is anticipated that in the performance of the duty imposed upon that commission by the transportation act to initiate or authorize such rates will yield a net railway operating income to meet the requirements of said act, the order of said commission, when made, will authorize or initiate such increases in rates as may be necessary to meet the requirements disclosed in the record already made and likewise such increases in freight rates or passenger fares as may be necessary to meet the additional expense which will be imposed upon the carriers by such increase in wages, if any, as may be made by said Railroad Labor Board, and without further hearing upon the part of the Interstate Commerce Commission.

"Petitioners further state that the record made before the Interstate Commerce Commission, a copy of which has been filed with this commission, and the monthly statements of earnings and expenses show that the net railway operating income of the carriers in western classification territory since January 1, 1920, has been at a rate which, if continued throughout the year, will fail to meet the interest charges of those carriers without regard to such increase in expenses as may result from the decision of said Railroad Labor Board, by reason whereof it is manifestly essential, if the said carriers are to remain solvent and be in position to perform their public functions, that all freight rates, or freight rates and passenger fares, both State and interstate, should be readjusted to become effective not later than September 1, 1920.

"Wherefore petitioners pray that this honorable commission institute an appropriate inquiry for the purpose of so readjusting rates on State traffic as to bring the same into harmony with such readjustment of rates as may be made by the Interstate Commerce Commission in the proceeding aforesaid, and respectfully suggest, so far as consistent with the authority of this commission, that the same be heard on a common record by the Interstate Commerce Commission and this commission. Petitioners further pray that said readjustment be made effective not later than September 1, 1920, and that the rules or requirements governing the publication of tariffs be so amended or suspended as to effectuate said purpose.

"Respectfully submitted.

"——— ———."

CARRIERS' NEEDS FULLY SUBMITTED TO STATES.

Mr. WOOD. And so these proceedings came on for hearing before the several State commissions upon the record made by the railroads themselves in Ex parte 74.

Now, the railroads generally did not offer additional evidence. In one or two cases they offered a little supplemental evidence, but in most cases they did not. They felt that that evidence was complete in itself as demonstrating the necessities of the situation and the method by which that necessity should be met.

I have spoken of the award of the Labor Board, and those matters were officially or unofficially, at least in most cases, possibly in all cases, called specifically to the attention of the State commissions, or at least they were matters of common knowledge. The record in Ex parte 74 showed that at that time and before the award of the Labor Board was made the carriers of the United States as a whole were earning at a rate which would yield on the level of costs then existing net revenues of $219,000,000 a year. That is nearly $300,000,000 a year——

Senator POMERENE (interposing). What is that date?

Mr. WOOD. That is the revenue situation as it existed when Ex parte 74 was presented to the Interstate Commerce Commission. That is nearly $300,000,000 less than the interest charges of the American carriers as a whole.

The award of the Labor Board was estimated by the Labor Board itself at $615,000,000, which was another item of expense to be absorbed, so that deducting from the $615.000,000 added expenese the $219,000,000 annual income then being received by the railroads of the United States, we would have had an actual operating deficit of $400,000,000 a year, except for these general advances in rates which were made.

Now, we said to the State commissions in effect—without undertaking to elaborate what we said—we said: Gentlemen, here is a national emergency such as has never existed before. Here is a situation in which the State ship-

pers are interested, not only in State traffic but in interstate traffic, and they are interested in solvent railroad systems and in adequate transportation facilities. Now, it is perfectly obvious that these railroad systems can not remain solvent; they can not pay their bills, let alone their interest charges, unless there is an advance in rates. It is also manifest that these existing rates are based on the prewar costs——

The CHAIRMAN (interposing). Mr. Wood, the committe is perfectly familiar with that, if I may be permitted to say so. We know that the railroads had to have additional revenue, and we know that you presented that to the various State commissions. And no one questions, at least I do not, that the record made before the Interstate Commerce Commission upon your application showed or proved the necessity for additional revenue. And there is no use going through that to any extent. That is not the complaint; it has nothing to do with the complaint. The complaint is that after the various State commissions did act upon your application, and then when the carriers came to complain of discriminations, that there was no evidence introduced of any discrimination except the discrimination that might be inferred from the difference in the level of rates, if there was any. Now, that is the point upon which the complaint rests, and the insistence for a change in the law—I am not suggesting that there ought to be any change; we did not make any change in the law originally, in my opinion. But get to that point, if you will.

Mr. WOOD. Well, I understand, Mr. Chairman, that the matter here before the committee is just as you have stated it, but I have read with some care the greater part of the evidence that has been offered by the State commissions, and rightly or wrongly, I certainly gained the impression that those gentlemen, consciously or unconsciously, had undertaken here to produce an atmosphere from which it could be said that these carriers had not made any real effort to show to the State commissions these things that were shown, and to indicate to the State commissions that the situation required a certain sort of action upon their part, but that they just handled the thing in a pro forma sort of way, or as some witness expressed it, told them to sign on the dotted line, because they wanted to have an opportunity to go to the Interstate Commerce Commission.

The CHAIRMAN. That is what they said, some of them, but the record in Ex parte 74, everybody recognizes, proved the need of additional revenue. Now, that was just as applicable in State rates as in interstate rates, and I do not believe there was any serious attempt, either on the part of the State commissioners or the witnesses, to show that this record did not prove the necessity for more revenue; for increased rates. Now, let that stand. The committee will have no doubt about that, no matter what they may think.

Mr. WOOD. No; I am sure of that.

The CHAIRMAN. The committee will have no doubt about that. The question comes a little later than that. After the State commissioners had acted, and then the carriers came to the Interstate Commerce Commission to apply for relief against unjust discriminations, then, in that event, the commissioners say that the carriers did not attempt to show discrimination as against interstate commerce or localities or persons engaged in interstate commerce, except to show that the rates fixed, in all instances, by the States were not in harmony with the rates fixed by the Interstate Commerce Commission.

Senator POMERENE. Mr. Chairman, if I may refresh your memory, this statement was made by some witness—I am not sure but it was by Mr. Benton; no, I am wrong about that; it was not Mr. Benton—but some witness, in speaking of the situation in Illinois, said that there were different territories in Illinois, and some of those rates were made with reference to the western territory and some with reference to the eastern territory, and some with reference to the southern territory, and he made an expression something like this: That the railroads brought in the records from the Interstate Commerce Commission, and the inference which he drew from that was that there was no effort to present the evidence showing the relation between what was done before the Interstate Commerce Commission and these various local commissions.

The CHAIRMAN. That is true.

Senator POMERENE. And I should like to hear what Mr. Wood has to say about that.

The CHAIRMAN. Illinois at one time was divided into three groups, and finally into four groups, and the advances were different in the four different groups. But still the main point is, Ought we to change the law because of the

alleged failure on the part of the railroads to establish any discrimination except that which is to be inferred from a different level in rates?

Senator POMERENE. I should like to hear Mr. Wood discuss briefly the suggestion that I have made, and I should also like to hear what he has to say with respect to this transportation act changing the law as it had been pronounced by the Supreme Court in its several utterances on that subject.

The CHAIRMAN. Mr. Wood has already expressed his opinion on that point but he may repeat it.

Mr. WOOD. I can answer both of your questions very briefly. So far as the Illinois situation is concerned, the Illinois case will be described fully by Mr. Fletcher, who tried the Illinois case, and who understands it more fully. But I understand there were two elaborate hearings before the Illinois commission. But my intention, gentlemen, in bringing this situation to the attention of the committee generally is to dispose of the impression that may have been made on the committee that we did not put the State commissions into possession of every fact and circumstance that we thought might assist them in arriving at a correct conclusion. We did.

The commissions took their own course then. Some of them had lengthly proceedings, and some of the commissioners simply said, Gentlemen, we believe there is an emergency here which requires action immediately, and we are going to take it. Some had long hearings, and some had short hearings. The railroads had no control over it, of course. And so far as the railroads were concerned, they said, Here is our case; here is the record that we have been furnishing to you day by day from Washington, and if you want anything else all you have to do is to ask us, and we will tell you.

The CHAIRMAN. That is, in the original case?

Mr. WOOD. Yes; that is what I understood Senator Pomerene's question referred to. That is as brief and as elaborate an answer as I desire to make to the question.

Senator POMERENE. Do not elaborate on it, but just briefly in a general way.

Mr. WOOD. Now, with reference to your second question, Senator, I said on yesterday, whether the transportation act added anything to the jurisdiction of the Interstate Commerce Commission over the State rates, must depend upon the interpretation of the interstate commerce act as it stood, whatever that was. The precise limits of its jurisdiction had not been determined by the Supreme Court. The existence of the power of the Federal Government to reach after discrimination had been determined by the Supreme Court in the Shreveport case. The precise limits of the jurisdiction of the Interstate Commerce Commission had not been determined.

I also stated that I thought the prohibition in section 3, as it stood then, prohibiting discrimination against persons, localities, or descriptions of traffic was all-embracing, and that the decision of the committee and its action in inserting new language into the section, taking, as I understand it, the exact language of the Supreme Court in certain cases, made it clear that the prohibition was all-embracing. That was my personal view. Even if it did not make any chang in the law, to my mind it was a desirable clarification, because it made it clear that Congress did intend that the prohibitions in section 3 should be all-embracing. If my position on that is wrong, and those three propositions were not all-embracing, then that law certainly made it so. My opinion is that it did not change the law, but in the absence of a determination by the Supreme Court of the United States as to how far it went before, I can not guarantee that it did not change the law. But that is my personal view.

I also said that so far as the cases in which I was personally concerned—and I think I can say that for all the other gentlemen who represented the railroads—however mistaken we may have been, that we thought that, in the cases coming before the Interstate Commerce Commission on these rates, we made a case under the doctrine of the old Shreveport case, as well as presenting the case from a revenue standpoint and from the necessity of providing adequate revenues for transportation facilities.

Now, we may have been mistaken, but we thought we had made it; and the Interstate Commerce Commission thought we had made it, but whether the Supreme Court will think we made it remains to be seen. But in the cases with which I was concerned, I thought we had made that case; at least we tried to.

I am going to come to the cases and put before the committee the things that were done before the Interstate Commerce Commission. I am not going to put

before the committee all the things that were done before the Interstate Commerce Commission, but some of the things which I think will answer your question specifically.

ACTION OF STATE COMMISSIONS.

The CHAIRMAN. There is one thing I want to get—it may be the record already shows it—I think it is very material to know just what the State Commissions did upon your application for an increase in rates.

Mr. WOOD. You have anticipated the very thing that I was about to state.

The CHAIRMAN. I thought you were about to refer to your application to the Interstate Commerce Commission.

Mr. WOOD. I was going to apologize because you had asked me a question, and I was going to apologize for not going directly to it.

Now, of the 48 States, 23 States conformed, in all respects, to the decision of the Interstate Commerce Commission in Ex parte 74.

One State conformed practically in all respects. That was the State of Alabama, which granted everything that was requested except the Pullman surcharge, and I do not think it needs any explanation to show that a Pullman surcharge on interstate traffic, and no Pullman surcharge in State traffic results in discrimination against persons. At any rate, the Interstate Commerce Commission so found.

That was the only exception in the 24 States—exactly one-half of the States conformed, with that exception.

There were eight States that granted all the freight advances that were requested, and in strict harmony with the decision in Ex parte 74, but granted no advance whatever in passenger fares.

Senator POINDEXTER. What eight States were those?

Mr. WOOD. They were New York, Wisconsin, Minnesota, Iowa, Montana, Ohio, Michigan, and North Carolina.

The CHAIRMAN. They were all statutory rates?

Mr. WOOD. They were all, in each one of those States, statutory rates—that is, the passenger rates. And I was going to say further that in at least a majority of the decisions in those State cases, they said, at least by inference, if not in fact, that they would have granted the increases in passenger rate if they had had the power to do so.

The CHAIRMAN. New York the power.

Mr. WOOD. About that I understand, from New York counsel, there is some doubt, although I do not want to get into any controversy as to what the New York law is.

The CHAIRMAN. I do not think there is any doubt about it. I have seen the New York law.

Mr. THOM. We think there is some doubt, Mr. Chairman. We will present our view about that.

Mr. WOOD. Now, there were four States that granted the freight advances, with the exception of certain discriptions of traffic. Those States were Arkansas, South Carolina, Utah, and Louisiana. And in each of which there were statutory passenger fares.

There were five States that granted no advances in passenger fares, but granted advances in freight rates based upon different percentages of advance. They did not pretend to say there were no articles which were related to interstate commerce, but they took all the traffic in the State and granted a different percentage of advance than that which was authorized by the Interstate Commerce Commission. Whatever you may think of the action of those States, you must see that it must have resulted in countless discriminations against interstate shippers who were paying the higher rates. Those States were Illinois, Indiana, Nebrska, Texas, and Kansas.

There were four States which granted the passenger-fare advances that were requested and granted the freight advances generally, but excepted certain commodities, and sometimes they were commodities which comprised a very substantial part of the traffic, State and interstate both. Those States were Georgia, Florida, Tennessee, and Missouri.

There were three States that denied any advances whatsoever in either passenger or freight rates. Those States were Arizona, Nevada, and North Dakota.

Now, looking at that picture as a whole, it seems to me that the contrariety of action in the country as a whole certainly demonstrates the necessity for Federal machinery which can act and bring into harmony those things that

ought to be brought into harmony. It must be seen that this contrariety in the several States not only must but did result in countless discriminations against persons and localities. And one of the proposals here is to remove from the Interstate Commerce Commission all authority to deal with the subject, and other proposals so hedge it about that I do not believe it can be brought about in a practical way.

The CHAIRMAN. Now. can you answer the question I put to you yesterday, possibly? Have you endeavored to compute the amount of revenue on State traffic that would have been raised under the rates as established by the States upon your application, and the revenue which is received under the Interstate Commerce Commission's order? In other words, how much revenue did the railroads lose, or how much would they have lost, if the State rates had been allowed to stand?

Mr. WOOD. I inquired as to that yesterday, and found that one of my associates had intended to state that, but I will state it as he told me the figures. It is estimated that $95,000,000 per annum is the amount of revenue that would have been lost to the railroads if these State orders had remained in effect.

The CHAIRMAN. Are you able to divide that between freight and passenger traffic?

Mr. WOOD. I can not, but he possibly can; and if he can not do it now, it is susceptible of division.

Now, Mr. Chairman. that is not all the losses. As I go on with this story of individual cases I think I can demonstrate that if these orders of the State commissions had remained in effect that the losses in revenue would have been very much more substantial, because of the inevitable effect of the State rates upon the interstate rates themselves. And this $95,000,000 is applied only to that which was State traffic during 1920, when the discriminations which we claim were created were not in existence and when the State rates were not on such a level as to interfere directly with the interstate rates or fares. So that is a minimum figure. How much it would have to be increased in order to show the real ultimate effect upon the revenue of the carriers is largely speculation, although as to the passenger traffic I am going to try to give you some figures on that.

FEDERAL AUTHORITY NECESSARY.

Now, I say the contrariety of action and the result of it, to my mind, demonstrates the necessity for some power in the Federal Government to bring about harmony in these matters that ought to be brought into harmony. And one of the things, to my mind—and I can not get away from the revenue feature—whether it is properly here or not, it is a big part of the problem if the Federal Government is to see that the railroads are supported by proper revenues. And I think the necessity for that power is made even more apparent when it is remembered that of those States there were at least 12, and possibly 15, depending upon the construction which you place upon certain State statutes, in which the State commission was absolutely without power to touch the State passenger fares. They had no jurisdiction over them. They could not put them up on the level that the situation required. They had to let them stay at the pre-war level at which they had been fixed by the State legislatures, and unless the Interstate Commerce Commission could exercise its authority in those cases that rate would be there.

Senator POMERENE. Let me make a suggestion to you which has occurred to my mind. You have put this in a very forceful way, but I am not quite clear that you have demonstrated that your conclusion is right. You have indicated here that there were 24 States, save one with a slight modification, but 24 States in which the State commissions ratified or conformed to the rates established by the Interstate Commerce Commission.

There were eight States in which they ratified it so far as the freight rates were concerned, but not so far as the passenger rates were concerned. And there were slight modifications. Those 32 States may or may not have been in different sections of the country where they had no difficulty in arriving at the results. But it is possible that the other State commissions may have discovered that the rates made by the Interstate Commerce Commission, so far as they relate to traffic in their localities, were entirely different in amounts, it may be, from the rates made elsewhere; and there may have been peculiar reasons in those several States which would have compelled the State commissions, in the exercise of what they thought was the proper thing to do, to refuse to grant what the Interstate Commerce Commission did.

Now, I am not expressing an opinion either that the one was right, or that the other was right, but I am suggesting that there may have been reasons which may have justified the actions of these State commissioners. What do you say; do you differentiate in that respect in any way, or do you satisfy yourself with simply the conclusion that because 32 States did what the Interstate Commerce Commission wanted done, and the others did it in a more or less modified degree, that, therefore, they are wrong?

Mr. WOOD. Well, I do not base it upon the relation of 32 to 16. I think that the situation was such that both in the interest of adequate revenues and for the prevention of discrimination it called for uniform treatment throughout the country. My opinion about that may be a biased one, but that is my honest opinion.

The CHAIRMAN. That may be so from the railroads' standpoint, but we did not intend that. At least, I did not intend that when we passed this law. I did not intend to take rate-making power entirely away from the State commissions. And your analysis of it leads to but one conclusion, and that is that the rate-making power has been taken entirely away from the State commissions. And that is entirely consistent with the idea, too, that revenue is a prime chief factor in the making of rates. It must be so, because a reasonable rate is one that will make to the carrier a fair return upon the value of the property used in the service. Now, there was a way, of course, in which these passenger rates in States that had established them by legislation could be reached. There is no question about that. Upon application to the Interstate Commerce Commission, if the Interstate Commerce Commission found that the passenger rate, whether fixed by the State legislature or fixed by the order of the Interstate Commerce Commission, discriminated against interstate commerce or against persons or localities in interstate commerce, the Interstate Commerce Commission has the power to set aside a statute just as completely as it has the power to set aside the order of the commission. That could have been reached. But the whole question is here, as it seems to me, whether the mere fact that there is a difference between the State rate on the same commodity and the interstate rate or if the rate in passenger traffic is different in the State from the interstate rate—whether that conclusively establishes discrimination. That is the real question that we have got to deal with in the proposed modification of this law.

Mr. WOOD. Well, that is a question, Senator, to which I have just arrived——

The CHAIRMAN (interposing). Now, if the Interstate Commerce Commission—I do not say that it has, but if it has—construed this statute so as to eliminate the necessity of introducing evidence showing discrimination, that is, showing some actual injury inflicted upon some person or locality or upon interstate commerce, it has gone beyond what I have conceived to be the terms of the transportation act. Because, as you will remember, whatever may be the best policy to pursue—and I am not doubting our power—congressional power—but whatever may be the best policy to pursue, you will recall the fact, or Mr. Thom will, at any rate, that in conference that part of the House bill which was directed explicitly to the matter of undue burden upon interstate commerce was stricken out and we preferred to hold the law substantially as the Supreme Court had declared it in the Shreveport case, and in the Minnesota rate case, and in the Illinois case. Now, I believe that that was the intention of this statute.

Senator POMERENE. Mr. Chairman, I think I agree with you as to what was our intention when that statute was drawn and I am going to express this opinion tentatively: I haven't any doubt but what some of these rates have, to some extent, been discriminatory, and I think that the shippers in those localities have had some rights to complain; but while the advocates of a repeal or modification of this transportation act have urged that modification they have not persuaded me that the fault lies with the statute. I have been constrained to believe, from what I have heard up to date, that the fault lies with the administration of the law rather than with the law itself. And if you have any suggestions to make along that line I would be glad to hear them.

The CHAIRMAN. That is the real point.

Mr. WOOD. Well, Mr. Chairman——

The CHAIRMAN (interposing). And may I say this one word further: Now, we do not know, we have not as yet been advised with regard to the evidence that was submitted to the Interstate Commerce Commission for the purpose of establishing discrimination, and it may be that the commission has not passed beyond the limits which we attempted to prescribe for it. But if the Interstate Commerce

Commission, as is charged by the State commissions, took for granted that because there was shown a difference in a rate fixed by the State commission and a rate fixed for the same service by the Interstate Commerce Commission as conclusive evidence of discrimination, then I would be compelled to differ from the construction of the act put upon it by the Interstate Commerce Commission.

Mr. WOOD. Well, Senator, I can not state my own conviction too strongly, and that is to the effect that there isn't any fault either with the law itself or with its administration; and I think that if the committee could—doubtless it will not have the time to do so—but if it could read all the opinions that the Interstate Commerce Commission has delivered in connection with these cases which, as a whole, are under attack here—that if the committee was prepared to believe, as it must believe, that the facts as stated in the opinions represented the facts, it would find there had not been any error committed by the Interstate Commerce Commission, and that, on the contrary, if it had not acted as it did act, that an intolerable condition would have resulted, both with respect to discriminations as against individuals and communities and with respect to the provisions for adequate transportation.

The CHAIRMAN. I do not just see that as clearly as you do. You estimate the difference between the revenues between the State rates, as established by the States and the rates that were finally established by the Interstate Commerce Commission in the States at $95,000,000. Now, it is obvious that much the greater part of that was a deficiency in revenue from passenger fares.

Mr. WOOD. Yes, sir.

The CHAIRMAN Because 50 per cent, as you have said, of the passenger revenues of the railroads, as a whole, comes from intrastate business. And we all know that many of the States had fixed the passenger fares by statute at 2 cents a mile, and the disparity between that rate and the 3.6 cents a mile, as I remember it was about that, fixed by the Interstate Commerce Commission would account for the very great difference in the revenue. Now, that could have been reached. I can conceive that it could easily be shown that the difference betwe 2 cents a mile in the State and 3.6 cents a mile on interstate passenger traffic would create that discrimination which the Interstate Commerce Commission had the power, long before we passed the transportation act, and certainly has under the present transportation act, to remove.

Mr. WOOD. Yes, sir.

The CHAIRMAN. But I can not see how the slight difference in State freight rates which existed after the States had acted would necessarily establish a discrimination against interstate commerce.

PASSENGER FARE SITUATION.

Mr. WOOD. I am going to deal, Senator, with both the passenger and the freight situation. I have undertaken to deal with it as a whole simply in painting the general picture. I am going to deal with it specifically, in specific cases, in an effort to answer your very appropriate inquiry as to what the facts are. And I am going to try to state those facts, not only as they were found by the Interstate Commerce Commission in its decisions in these particular cases, but as they are of record.

Now, I had intended to deal with the passenger situation first. I will be glad to deal with the freight situation first, if the chairman prefers. But I have here a map upon which I have shown in different colors the action of the several State commissions in connection with these passenger fares. I will present these maps for the record.

(The maps referred to can not be printed as a part of this record.)

Mr. WOOD. The States in pink, and which in the record copy which I have provided are in a single hatch, are the States in which there were no advances in passenger fares, and in which there were statutory passenger rates, ranging from 2 to 3 cents per mile, according to the States.

The States in white are the States which conformed fully to what the Interstate Commerce Commission did.

The States in blue are the States in which the State commissions refused to make any advances in passenger fares, and where there were no statutory passenger rates.

Now, that map shows, I think, what a crazy quilt of passenger fares we would have had in the United States if there had not been some power to investigate the effect as to discrimination upon interstate commerce of the situation which would have been created by the States. I do not want to elaborate

upon this map, which I think tells it own story, but I do want to point out the location of those States. Their geographical location is such that it is perfectly manifest that you could not have maintained your interstate fares on the level fixed by the Interstate Commerce Commission if these State fares had been retained either at 3 cents a mile or at the statutory rate.

Now, the matter is complicated by statute in two ways: Some of the statutes coincide with the Director General's rate, which was 3 cents a mile, but there were other statutes antedating Federal control, many States which had 2-cent laws, and at least one State which had a 2½-cent law. It was claimed by the State authorities in those States that those statutory fares were revived, notwithstanding the provisions of the transportation act, that those statutory fares would become revived on the expiration of the guaranty period. That they had been merely in suspense during the period of Federal control and during the guaranty period. Now, I have never thought that that was a proper interpretation of the law, but it is a question upon which the courts have differed. The United States Circuit Court, or a three-judge court, sitting in New York, held that that was right; that upon the expiration of the guaranty period these statutory rates would be revived. The United States Circuit Court, or a three-judge court in the eighth circuit, held to the contrary. The lower State court in New York held with the eighth circuit; that is, that they were not revived, and the court of appeals, in an opinion which it is somewhat difficult to construe, apparently held with the three-judge court in New York that they were revived.

Senator POINDEXTER. Did they reverse the lower court?

Mr. WOOD. Yes, sir. So that the situation would have been still further aggravated. This $95,000,000 would have been enormously increased if the decision of the New York courts, both State and Federal, that those statutory fares were revived should turn out to be sustained by the Supreme Court, and the decision of the eighth circuit court should be reversed. In that case you would be staking both the revenue and the effect on commerce on the question of what will be the determination by the Supreme Court.

Further, whether the statutory rates were revived or were not revived, the maintenance of the 3-cent rate which was in effect in most of these States at the termination of Federal control, would, in itself, not only produce this loss of revenue which goes to make up the $95,000,000, but would of necessity bring down all of your interstate rates in a very large degree.

The CHAIRMAN. Mr. Wood, it would be very desirable, of course—and all will readily agree to that—that there should be substantially uniform rates where passenger traffic is carried on under the same conditions. But the railroads of the country, in the best years of their earning capacity—take the years 1915, 1916, and 1917—carried on business with this diversity of passenger rates. New York for years has had a 2-cent fare. Iowa had a 3-cent fare at the time that New York had a 2-cent fare, for years and years. Out further West there was a 4 or 5 cent fare for years and years, while New York had a 2-cent fare. In some way or other they did fairly well with that diversity in passenger rates.

Now, it would not have been a killing matter if the railroad had to proceed with some lack of uniformity, while I concede at once that it would be desirable, if it could be done.

Mr. WOOD. I am not suggesting, Senator, that there should be a uniform passenger fare all over the United States. It might be desirable, and it might not. It must be conceded there are different conditions in different sections.

The CHAIRMAN. They are not uniform now.

INTETSTATE TRAFFIC CONTROLLED BY STATES.

Mr. WOOD. They are not uniform now. But what I have been suggesting here is that this loss of $95,000,000 would not only have been tremendously increased—it would have been increased in the eastern district alone if the 2-cent fare were substituted, by about $60,000,000 or $80,000,000. But the effect would be to destroy the interstate rates. The evidence in each one of these cases showed that, with the existence of a lower fare within the borders of a State than applied on interstate traffic, that the practice of getting off the train at a border point and rebuying a ticket so as to save that difference in fare went to the extent of changing interstate passenger travel into State travel; that such was the actual fact which took place in large degree during the time when the situation was as is shown by this map; that it had been the previous experience of the carriers in all cases where that situation existed; that they

were unable to maintain their passenger fares interstate. And I think it is quite evident that that is the fact.

Take the situation, for example, of a man traveling from New York to Chicago by the New York Central Railroad. With the exception of a little corner across the State of Pennsylvania there [indicating] he can travel in a State that has got a 2-cent fare practically all the way from New York to Chicago. Now, I do not suppose that he would get off at each one of those State lines and rebuy a ticket, but he certainly would get off once, and probably twice. And the testimony was that the fares in New York State absolutely controlled and dominated the interstate fare, and I think it is recognized that that has been the result everywhere.

Now, in one of those cases, the Kansas case, the Santa Fe collected some evidence as to the effect of this 3-cent rate in the State of Kansas, as compared with the 3.6-cent fare. They had a lot of illustrations as to how much and to what extent the people got off at the State lines and rebought tickets. Those illustrations were very startling. For instance, between Kansas City, Kans., and Kansas City, Mo., the number of ticket sales increased greatly in September, 1920, over those in September, 1919. That meant that a man traveling from a point in Kansas to Kansas City, Mo., bought a ticket to Kansas City, Kans., and either trusted to getting by into Kansas City, Mo., without rebuying a ticket, just a mile or two farther, without paying any further fare, or he got off at Kansas City, Kans., and rebought his ticket.

The number of cash fares alone grew from 11 cash fares in September, 1919, to 2,500 in September, 1920, and the sale of tickets at all those border lines showed very startling increases.

Those are conspicuous examples, and I do not present them as being a general picture for the State as a whole. Of course that would be more aggravated at Kansas City than anywhere else.

But the Sante Fe Railroad investigated the effect of those lower State fares in Kansas upon its interstate business in Kansas, and it showed—and this is one of the pieces of evidence in the Kansas case, one of the pieces of evidence presented to the Interstate Commerce Commission—that the effect of this lower fare in Kansas had been to transform one-fifth of its interstate travel in Kansas into State travel.

The CHAIRMAN. Does that prove discrimination or not?

Mr. WOOD. I think it proves two things: I think you have at least indirect regulation of interstate rates by the State commissions, and I think it proves a discrimination against persons, against travelers. And they presented that with other evidence in the case.

The CHAIRMAN. You may be right about that. I do not dispute that. But, of course, there is a way to reach it, and you may have pursued the right way, but that does not reach the point that a mere disparity in rates is conclusive evidence of discrimination.

Mr. WOOD. I do not know of any case in which the carriers presented that proposition which you have just stated as a basis for action, or in which it was the basis on which the commission acted.

The CHAIRMAN. We dealt with this disparity of State and interstate rates before. The Supreme Court, I think, dealt with it in the North Dakota suit.

Mr. WOOD. Now, I said that I thought that this difference between the 2-cent fare and the 3.6-cent fare——

Senator POINDEXTER (interposing). What was the difference between the Kansas fare and the interstate fare?

Mr. WOOD. The difference was the difference between 3 cents and 3.6 cents. That difference, I think, results in discrimination against persons.

EVIDENCE IN PASSENGER CASES.

That is not my conclusion simply; it is a conclusion based upon the evidence that was offered in these cases. And I am going to treat of that situation by dealing specifically with the Louisiana case. I take the Louisiana case because, while I know a good deal about all of these cases, I brifed and argued the Louisiana case, and superintended the preparation of the testimony, and I know exactly and in detail what was presented to the Interstate Commerce Commission.

The Louisiana State fares were made in 1890 by the legislature. They were subsequently confirmed by the order of the State commission, which was thereafter created. Whether the State commission has any jurisdiction over the

statutory fares is a question. I think it has. I think the attorney general down there thinks it has. At any rate, however, they declined to advance the State fares.

The Interstate Commerce Commission fixed a rate of 3.6 cents. They found that to be a reasonable interstate rate for travel across the State of Louisiana. Now, before that this 3-cent rate, which represented the prewar level of rates, had been applied uniformly on State and interstate travel; every traveler in Louisiana paid 3 cents a mile, whether a State or an interstate traveler. They sold him a ticket for a mile of travel in the State, whether a State traveler or interstate traveler, for 3 cents, with this exception, which is inherent in other situations, that where there were two lines of railroads between the same points, and those points were of considerable size, and one line of railroad was longer than the other, they had to make the same rate between those two points. They had to make the rate the same, or they would not have any business. So as between the two points on the longer line of railroad, a mile of passenger service was sold at something less than 3 cents before the decision in Ex parte 74.

Now, when Ex parte 74 came along and those rates were advanced to 3.6 cents per mile interstate the State of Louisiana declined to advance the State fares. The result was that for every mile traveled in the State of Louisiana by a man on a ticket sold for points within the State he paid 3 cents per mile. Another man traveling on the same train, and perhaps in the same car, on an interstate ticket paid 3.6 cents per mile.

Now, first we showed the history of those fares. We showed the fact, for whatever it might be worth, that they had previously been on a parity. We thought that carried with it at least some presumption——

Senator POMERENE (interposing). For how many years?

Mr. WOOD. For 25 years—for 30 years, from 1890 to 1920. We thought that where the Interstate Commerce Commission and the State commission without any complaint or action maintained a parity of charge for travel in the State of Louisiana for a period of 30 years, there was at least some presumption that it was a proper relation. But we did not stop there. We showed that these pasengers rode in the same train, and in the same cars, and frequently in the same seats. We stated affirmatively by our own evidence that the circumstances and conditions under which these State and interstate passengers traveled were identical, with this exception, that, if anything, the cost of carrying the State passenger 1 mile was somewhat greater than the cost of carrying the interstate passenger 1 mile. And we showed that that greater cost, State than interstate, grew out of two facts which were offered of record: First, that the State business was shorter-haul business than interstate business; and, secondly, that the terminal expense represented a larger expense than it did on interstate business.

And then we showed this: We showed, from an examination of the ticket sales of local stations in the State of Louisiana, that with the exception of the chief commercial centers, the ticket sales from those local stations of which, of course, there were scores, for State travel, very greatly exceeded the ticket sales for interstate travel; that those local stations were maintained largely, so far as passenger business was concerned, for State travel, and that the maintenance of those stations was one of the heaviest items of expense incident to the passenger travel in that State. And we also showed that the greater proportion of that expense was directly assignable to State, rather than to interstate business. And, as I say, we showed that the transportation furnished was on the same kind of trains; the thing that we did and for which we charged the State and interstate passengers was the same in every case.

Then we showed that the Interstate Commerce Commission found that that rate ought to be advanced to 3.6 cents, and that the rate, thus advanced, would be a reasonable rate. And we offered some further evidence in addition to that.

Now, in addition to all this showing of our own, as to the conditions under which these passengers, State and interstate, respectively, were sold a mile of transportation in Louisiana, we offered the opinion of the Louisiana State commission itself, in which it decided this case, and in which it denied the passenger fare advances, but granted the freight advances, and in that opinion the State commission of Louisiana said this:

"We have given due consideration to the applications of the carriers, and we are of the opinion that the situation in the State of Louisiana is not different from that which prevails elsewhere in the United States."

We said that for 30 years this State commission in Louisiana, and the Interstate Commerce Commission have maintained this parity of rates. The Interstate Commerce Commission has said that in order to make a reasonable charge that the rate must go up 0.6 of a cent. You have said that there is no difference in conditions that distinguishes the State of Louisiana from those on which the Interstate Commerce Commission acted. But, nevertheless, you say that this passenger fare must be maintained at 3 cents, and it follows, as a necessary conclusion, that you are maintaining there a rate that is not only unduly low, from the standpoint of the carrier, but which results in favoritism to every man in Louisiana that travels on a State ticket.

Now, we had other evidence, dealing with specific localities, to which I will subsequently refer.

The CHAIRMAN. Just pause a moment there.

Mr. WOOD. Yes.

The CHAIRMAN. I want you to get my state of mind.

Mr. WOOD. Yes.

DISCRIMINATION AGAINST PERSONS THROUGH UNEQUAL FARES FOR SAME SERVICE.

The CHAIRMAN. Now, the circumstances you have presented might be entirely satisfactory in establishing the fact that the rate established by the Louisiana statute was unreasonably low, and, therefore, the act was void as being confiscatory. But when you come to assert that because the State man travels through Louisiana at 3 cents per mile, and that the interstate traveler travels through the State of Louisiana at 3.6 cents per mile, and that that is a discrimination, I am not persuaded of that, any more than I am that if a tourist traveling at 1 cent a mile passes from New York through Louisiana to California he is discriminating, or that the railroad is discriminating against the State man that has to pay 3 cents a mile. That is the point in my mind. Simply because one man has to pay more for a thing than another does not prove discrimination in a transportation sense, as I understand it.

Mr. WOOD. Let me try to point out the significance which I attach to that situation. That was not all of that Louisiana situation. We offered evidence dealing with specific localities, and everything of that sort.

But I want to address myself to the chairman's question, because personally I think it goes to the very heart of this case, so far as the question of public policy is concerned. And whether that which I describe results in undue discrimination, or not, under the existing statute, if it does not, I think it ought to. I think your question, as I say, is not only a searching one, but it goes to the fundamentals of the problem, whether we consider it in conjunction with the law as it now exists, or whether we consider it as a matter of public policy.

That evidence was offered for two purposes: It was offered to show that the interstate rate of 3.6 cents would be a reasonable rate as applied to the State business. It was not offered primarily for that purpose, but it was offered for that, because, as the Senator will remember, under the law as it now stands, when the Interstate Commerce Commission finds that discrimination exists, it must say what rate should be established, and we took it that that meant that it must say would be a reasonable rate for State and interstate travel. So we said, just as the Senator has said, that that evidence, to our minds, is conclusive of the fact that the State rate is unreasonably low, and that the application of a 3.6-cent rate would produce a reasonable rate, both State and interstate.

But we offered it primarily for the purpose of establishing undue discrimination against persons and descriptions of traffic, which was afterwards supplemented by other evidence.

Now, my thought about that—and I hope I can make it plain—is this: We start out with the proposition that we are selling to two men identically the same article under identically the same circumstances and conditions. That is what we proved. There is no question of an excursion rate, as compared with the standard passenger fare, because there the sale of passenger transportation is not under the same circumstances and conditions. It is not a round-trip rate, as compared with a standard passenger fare, because there the circumstances and conditions are not the same.

We are dealing with two men who are traveling at standard passenger fares; that is, at full-rate tickets within the State of Louisana. We are selling to each one identically the same thing—a mile of transportation in identically the same train, in identically the same car, and perhaps on identically the same

seat, at least within the same train, and we are selling them the same thing under the same circumstances and conditions. There is no differentiation between them, as both the evidence and the decision of the Louisiana State commission discloses, and yet we are charging one of those men 3 cents a mile, and the other one of 3.6 a mile.

We certainly have treated them differently, and the dictionary definition of discrimination is a difference of treatment. Nobody can deny, I believe, or will deny, that there is a discrimination between those two men that have been charged different rates for the sale of identically the same thing. Whether that discrimination is undue or unlawful remains to be seen. But it is a discrimination. And my definition of undue discrimination is a discrimination or difference in treatment which is not justified by the circumstances; which has no rational or reasonable justification; that is purely arbitrary; that is extended as a result of favoritism or favor. If that is not a proper definition of undue discrimination, then I am unable to define it, and I may be wrong in presenting that as a definition of undue discrimination.

But let us get away for a moment from the transportation business. Let us go to the ordinary affairs of life, and say that two of us who are here present go to the same grocery store on the same day to buy a dozen eggs, and the grocer charges me 50 cents per dozen and he charges one of you gentlemen 70 cents for a dozen eggs on the same day, of the same quality, bought in the same quantity. Now, there isn't any question but that that grocer has wrongfully discriminated against you and in my favor. There isn't any justification for his act. It is a discrimination, and it is an undue discrimination.

Are we going to say that it is not an undue discrimination in a case of that sort unless we are in competition with each other? Are we going to say that if one of these men that goes in and buys a dozen eggs is a baker, and the other is buying them for consumption in his own kitchen, that the householder has not been discriminated against on that account? If the baker is buying in wholesale quantities, he may have a wholesale price, and that is not discrimination.

And when you come to the transportation business, if he is buying in wholesale quantities, such as shipping in carload lots in freight traffic, or is buying a mileage book in passenger traffic, that is a circumstance which may justify a difference in charge. But to charge two men on the same day for the same identical thing a different price without any justification for it is a wrong which damages the man who pays the higher price, whether he is in competition with the other man or not.

And let us push the analogy a little further and get out of the realm of private business for an illustration, but not taking a railroad company. But, take the case of a gas company, or an electric light compny, which is subject to State or municipal regulation. These companies must not discriminate in their charges. These gas companies or electric light companies can not, without being guilty of undue discrimination, make different rates to private consumers. They may make a different rate to a wholesale consumer, and for perfectly sound and legitimate reasons; they may give to the wholesale consumer a special rate, because there may be a different charge per thousand feet of gas or per kilowatt hour for electricity for those who use large quantities. But take two householders who are living side by side, and if the gas company or the electric-light company sells to one cheaper than to the other it is undue discrimination. If the gas company should sell to one of those men his gas at 80 cents per thousand and to the other one at a dollar, there can not be any doubt in my mind that that results in undue discrimination against the man who pays the dollar and in favor of the man who pays 80 cents. And they do not have to be in competition. And the same thing, it seems to me, applies to the railroad business.

The CHAIRMAN. Mr, Wood, there is a sense in which that is discrimination, of course. It is different treatment. But Congress has power only to regulate commerce among the States. It has no other power than that, and the only way in which we can reach into a State and attempt to affect or regulate or fix a State rate is because it is shown in a particular case that the action of the State in fixing its rate so affects and is so unjustifiable, in connection with interstate commerce, that in order to regulate interstate commerce we must also seize the State rate. Something more than mere favoritism is required; something more than mere discrimination in the sense in which you use it. It is a question of authority on the part of Congress, and as the Supreme Court

has said many, many times, the State rate must do something against interstate commerce. It is not enough that it merely may interfere with the individual. That is the way I understand the law.

Mr. WOOD. You have, of course, the effect upon interstate commerce as such. I have not reached that part of the discussion yet. In its effect upon the interstate rates themselves we showed in every one of these cases that the State and interstate fares were so related and so intermingled that the interstate fares could not be maintained if the State fares remained in effect. We showed that in Louisiana.

But I am dealing now, Senator, with the prohibition in the old act prohibiting discrimination against persons. The Supreme Court in the Shreveport case said that applied equally to a discrimination in favor of persons in State commerce and against persons in interstate commerce as it did to two persons interested in interstate commerce only. I am taking those two persons only. I have reduced it to its lowest unit.

The CHAIRMAN. The effect of that is that the Interstate Commerce Commission must be given power to fix all rates, passenger and freight.

Mr. WOOD. No, sir; because the strict mileage basis does not apply anywhere that I know of except in your passenger rates.

The CHAIRMAN. Well, I am not speaking of the mileage basis.

Mr. WOOD. Your freight rates involve a consideration of a vast number of things. And right at this point, although it is a digression, I want to answer the suggestion that the State rates are frozen or that the natural conclusion of the suggestions which I have made to the committee are to transfer all power over rates to the Interstate Commerce Commission.

The CHAIRMAN. We will have to suspend at this time, gentlemen. We have been a little over two hours and I am compelled to go now. We will take a recess until 9 o'clock to-morrow morning.

(Whereupon, at 11.40 a. m., the committee adjourned until Wednesday, November 16, 1921, at 9 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT.

THURSDAY, NOVEMBER 17, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9 o'clock a. m., in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will be in order. We will hear Mr. Scandrett at this time.

Mr. Scandrett, you may state your name and residence and your general relation to this subject.

STATEMENT OF MR. H. A. SCANDRETT, VALUATION COUNSEL AND COMMERCE COUNSEL OF THE UNION PACIFIC RAILWAY SYSTEM, OMAHA, NEBR.

Mr. SCANDRETT. My name is H. A. Scandrett; I am valuation counsel and commerce counsel of the Union Pacific System, and I live at Omaha, Nebr.

I have been connected with the Union Pacific for about 20 years. During the past 11 years the major portion of my time has been devoted to interstate commerce matters, including practice before the Interstate Commerce Commission. My service with the Union Pacific has been continuous except for a brief period during Federal control, when I was in traffic work, or at least essayed the rôle of a traffic man in the Central Western region of the United States Railroad Administration.

I have, of course, come very closely in contact with the work of the Interstate Commerce Commission during the past 11 years, and I think I am reasonably familiar with the interstate commerce act, and I know that I have endeavored to be a conscientious student of the transportation problems.

I am exceedingly sorry that the exigencies of the situation forced Mr. Wood to go to Chicago, thereby interrupting his statement.

In what I have to say I will endeavor to avoid any repetition in my own statement and endeavor to avoid covering the ground that he has covered or that he will cover when he resumes his statement.

UNFAIR CRITICISM OF THE TRANSPORTATION ACT.

So far as I can recall the transportation act of 1920 has been subjected to more severe and more unfair criticism than any other legislation of Congress. I say the criticism has been unfair, because there have been charged to that act many of the difficulties which were the necessary aftermaths of the Great War from which we had so recently emerged at the time of its passage.

The transportation act, as I view it, was not a temporary remedial measure, but was, rather, the seasoned judgment of Congress as to the policy best adapted to aid in the solution of what is known as the transportation problem. It has been condemned by its critics without a fair trial, and I think I may truthfully say without any trial, because in the very brief period which has elapsed since its passage, we have been passing from a war to a peace footing, with all of the tremendous readjustments in every field of industry which are the necessary concomitants of that situation. While it would not be surprising if men who have not given close study to this question should indulge in this criticism, it does come as a shock when men who specialize in this field

make these same charges, in view of the fact, as I see it, that the transportation act is in no wise responsible for much, if any, of what is charged against it.

Mr. Benton, the general solicitor of the National Association of Railway and Utilities Commissioners, in his opening statement to this committee said (reading):

"It is now 20 months since the transportation act was passed. It was the hope of those who framed and passed the act that it would settle the transportation problem. I think I may safely say that the transportation problem was never more unsettled than now. I believe, too, that candid men, who are capable of following results back to their causes, will say that in large part the present unsettlement and the present insistent demand for further legislation is directly traceable to the attempt which has been made to centralize the ultimate control of all rates affecting the commerce of 110,000,000 people living in the 48 States of this great country in the hands of a single board sitting in Washington.

* * * * * * *

"This abrupt departure from the plan of government, which was adopted by the founding fathers and followed for 130 years, has shocked our people.

"The results have not carried compensating advantages to anybody. They have injured the carriers. They have disturbed business. They have caused unrest and dissatisfaction among our people, who have seen their accustomed powers of government taken from them, and their local laws defied and their local officials enjoined by the Federal courts from enforcing their own laws within their own States. Thoughtful men everywhere, I think, view with misgiving this striking example of the present-day tendency to withdraw powers of government from the exercise of the people locally and to vest them in the hands of a bureaucracy here in Washington."

Certainly that is a sweeping indictment, and if the charge is true, it would seem that the blight caused by this transportation act is well nigh complete.

But are the charges true? Do candid men and thoughtful men have this judgment? Has there been an abrupt departure from the plan of government adopted by the founding fathers? Is the transportation problem more unsettled than ever before, and is there an insistent demand for remedial legislation? I do not think any of those charges is well grounded.

Mr. Benton presented to this committee certain resolutions of his association embodying recommendations to Congress as to additional legislation, and, presumably, it is the theory of that association and of Mr. Benton that if that legislative program were adopted there would be relief from these conditions of which he makes complaint. Now, briefly, there are six amendments proposed to the interstate commerce act:

First. An amendment curtailing the powers of the Interstate Commerce Commission over discriminatory State rates.

Second. The repeal of section 15a.

Third. An amendment defining the jurisdiction of the Interstate Commerce Commission with reference to electric railroads.

Fourth. An amendment in regard to the issuance of certificates of convenience and necessity covering the construction and abandonment of railroads.

Fifth. An amendment giving the State commissions certain authority with reference to car service.

Sixth. Amendments to the valuation act.

CHANGES MADE IN SECTIONS 13 AND 15A LARGELY CONFINED TO MATTERS OF PROCEDURE.

The last four that I have named are important in certain aspects, and I would like to touch upon them if time permitted, but I will not do so, because as compared with the first two propositions, their importance is not great, and they are not a part of the program which is submitted here to cure these evils, resulting as they claim, from the transportation act. So, I will confine my attention at this point to those two first items of legislation. As to both of those, I think I am correct in saying that the main thing that Congress did was to crystallize into statute law what had been the law of the land under settled decisions of the Supreme Court for many years. The principal thing Congress did was to change the law in matters of procedure. So far as fundamental rights were concerned, I think that this legislation had added nothing to the law as it was before it was passed.

I need not remind this committee that ever since the interstate commerce act was passed in 1887 the Interstate Commerce Commission has had broad powers to correct discriminatory rate adjustments, and since the decision in the Shreveport case there have been many cases in which that power has been exercised.

Now, the principal thing, as I view it, that the Congress did with reference to that phase was that it very much improved the procedure, and particularly in the provision which authorized the carriers to institute proceedings before the Interstate Commerce Commission challenging the attention of that commission to discriminations, so that it could investigate and, if found necessary, apply correction. I think that was a very valuable provision inserted in the transportation act, and I will deal with it somewhat more at length later on. With reference to section 15a, the contention, as I understand it, is that Congress in passing that section has given to the carriers a guarantee or an assurance of certain net revenue. Now, it has not; but even if it had, yet I say that it would not have changed the law as it has been interpreted or as it has been expounded by the Supreme Court for many years.

The CHAIRMAN. They make another objection to section 15a. That is, that we test the revenue by groups or by the railroads as a whole; that we ought not to do that.

Mr. SCANDRETT. I shall touch on that too, Mr. Chairman, later on.

Away back in the Smyth v. Ames case, the Supreme Court said—and it was at that time dealing with a rate case involving rates prescribed by State authority in Nebraska—that what the carriers were entitled to was a fair return on the value of their property devoted to the public service.

Now, that pronouncement of the court in that case was not novel. It had been the law of this country from the foundation of the country. And so, in so far as concerns the fact that this section 15a carries a legislative pronouncement that the carriers shall receive a fair return, it adds nothing to the law as it was before.

Now, for the first two years Congress prescribed that the rate of return should be 5½ per cent, with discretion to the Interstate Commerce Commission to add one-half of 1 per cent for additions, betterments, and other purposes. Now, is it a fair return? Or to put it this way: Is it more than a fair return?

Many courts have decided that 6 per cent is not an unduly large return, and other courts have held that it is too small, and that, too, I should say, in normal times. And certainly, in view of that and in view of the fact that this act came into being at a time when interest rates were almost double what they had been in normal times, nobody can be heard to say that 6 per cent is unduly large.

Is the value fixed by the Interstate Commerce Commission—and I talk about the Interstate Commerce Commission and Congress in the same breath, because these criticisms are leveled very generally against both of them, although perhaps more severe against the Interstate Commerce Commission than against Congress—is the value fixed by the Interstate Commerce Commission unduly high? There was no contention—and I have read the testimony of Mr. Benton very carefully, and that of the other commissioners very carefully, and I find no contention that the value as fixed by the Interstate Commerce Commission was in excess of the value of those properties, and the railroads themselves feel that the sum was too low, rather than too high.

The CHAIRMAN. Mr. Benton did not make that claim, but others did. Mr. Thorne——

Mr. SCANDRETT (interposing). I did not hear Mr. Thorne, and I have not been able to——

The CHAIRMAN (interposing). Mr. Thorne and, I think, Judge Cowan—although I am not sure of Judge Cowan—made the very earnest claim that the Interstate Commerce Commission had fixed the value of the property at least $2,000,000,000 higher than it should have been, and possibly $3,000,000,000 or $4,000,000,000.

Mr. SCANDRETT. Well, I think if the claim was made that it can be very fully met and very fully answered. I have not seen the claim. I have been unable to see Mr. Thorne's testimony.

The CHAIRMAN. Well, he presented the market value of the stocks and bonds and claimed that that was one of the elements that was recognized in Smyth v. Ames, and also the par value, as well as other things; and my recollection of his statement is that the real value was somewhere between $15,000,000,000 and $17,000,000,000.

Mr. SCANDRETT. Well, that, of course, opens up a very broad field for discussion, Senator; and if I should go into that——

The CHAIRMAN (interposing). I only mention that because you had said that no one had claimed that the valuation was too high.

Mr. SCANDRETT. Well, no one had, so far as I have been able to get the record. As I said, I read the statement of Mr. Benton and the commissioners, but I have not seen the testimony of Mr. Thorne.

Senator FERNALD. Judge, while you are on this point—I am not an attorney—but I want to ask whether you have ever heard of any usury case decided where the courts have held that 6 per cent was too high a return?

Mr. SCANDRETT. I have not, Senator. I do not think there is any such decision.

The CHAIRMAN. I think that Mr. Thorne did not claim that ordinarily 6 per cent was too high, or at least 5½ per cent, but his claim is that the railroads must share——

Senator FERNALD (interposing). That they were overvalued?

The CHAIRMAN (continuing). The misfortunes that followed the war, and everything else having come down, that they must come down, too, even though they do not earn the rate of interest upon the investment or upon the value of the property which ordinarily they would be permitted to earn.

Mr. SCANDRETT. Well, Senator, since this transportation act was passed certainly they have not earned a fair return, even on the figure that Mr. Thorne would concede was their value.

The CHAIRMAN. No; that is one of the points which they carefully avoid.

Mr. SCANDRETT. My own judgment is that if this transportation act, with its new provisions in regard to rates—referring to the additional language that was employed on the subject of discrimination in interstate rates and the remedies therefor—had not been passed in a time of great stress that 90 per cent or more of this criticism which has been leveled against it would never have been uttered. The misfortune of the transportation act was that conditions immediately following its passage required, and required imperatively, greater increases in freight and passenger rates than had ever been made before in the history of the country, and because that necessity existed and because as a result of that necessity increases were made the transportation act has been blamed.

Now, everybody, without exception, admits that, transportation act or no transportation act, very material increases in the charges of these common carriers had to be made, and that if they had not been made country-wide bankruptcy of these railroads would have ensued.

So, whether the act had been passed or not, the carriers would have had to go to the Interstate Commerce Commission, and they would have had to present their cases for an increase in rates. And following the decision of the Interstate Commerce Commission, or at the same time, they would have had to present their cases to these State commissions, and if there had been a proper recognition by these various commissions, Federal and State, of the situation as it was, the increases which were made by the Interstate Commerce Commission and which, after more or less protracted delay, were made effective in all of the States would still have had to be made.

Now, reverting a moment again to this question of the return, this 6 per cent return: A great many people have viewed that as if it was an amount very much in excess not only of what the carriers should have, but of what they had received in the past. But if you will harmonize the figures you will find that it is practically the average return that was earned by the carriers for a number of years. I say, harmonize the figures, because the statistics of the Interstate Commerce Commission as to those past years show the return on the investment in road and equipment and the value of the carriers' property, as found by the Interstate Commerce Commission in this Ex parte 74 was about 93.7 per cent of the value of the investment in road and equipment as such.

In the Interstate Commerce Commission's report for 1920 is set out the return on investment in road and equipment for every year, beginning December 31, 1908, and ending December 31, 1918. For the purpose of my calculation I leave out of the account the year 1918, which was a year during which the railroads were operated by the Government and a year during which the return was very small, and for reasons which it is not necessary for me to go into, but which are familiar to everybody.

The CHAIRMAN. That is, the return from actual operation?

Mr. SCANDRETT. Yes. Laying aside, then, the year 1918, the average during that period was 5.424 on the investment in road and equipment. Now, during that period there were great fluctuations; as I recall, the return one year, the highest, was 6.17, and the lowest was something over 3, or perhaps 4, even.

Now, if the carriers had received the revenues which the Interstate Commerce Commission anticipated they would, under its order—of course, they did not get them—the return of 6 per cent on the value that the Interstate Commerce Commission found of $18,900,000,000 would have aggregated on the investment in road and equipment account, which was twenty billion odd, 5.557. In other words, eliminating the second and third figure, the average for the period was 5.4. And the amount they would have received under Ex parte 74 was 5.5.

Now, then, if you further take into consideration the fact that under the transportation act every road which earned over 6 per cent on the value found by the Interstate Commerce Commission would be required to surrender one-half of that excess—and very obviously if the average return is 6 per cent there will be many roads which earn in excess of 6 per cent—it is perfectly apparent and entirely clear that the return under the transportation act, as administered by the Interstate Commerce Commission, would be less than during this 10-year period. And I think there is nobody who will contend that during this period of 10 years there was undue affluence in the railroad industry, but that, rather, the return was inadequate in many respects.

THE VARIETY OF ACTION OF STATE COMMISSIONS.

Now, Mr. Wood has detailed at some length the steps that were taken to obtain these increases in rates, both before the Interstate Commerce Commission and before the State commissions, and the subsequent proceedings before the Interstate Commerce Commission, involving the State rates.

I think one of the most striking things in Mr. Wood's statement was the letter which he read, which was addressed to the president of the National Association of Railway and Utilities Commissioners by the three State commissioners who sat with the Interstate Commerce Commission during the hearing in Ex parte 74.

I want, in that connection, to quote two sentences from the concurring opinion of Commissioner McChord in Ex parte 74. He said:

"The commission has attempted to deal with this case under the law in a broad, comprehensive, common-sense way, realizing that the primary responsibility for the future of our railroads rested upon its shoulders and that of the State railroad commissions, who have, throughout the case, and are still cooperating in a most helpful way. They will, in my opinion, measure up to this responsibility to make fully effective what the Interstate Commerce Commission has, with their cooperation, done in this case."

Now, if the committee pleases, I want to take up the question of the freight and passenger increases allowed by the State commissions, and without repeating what Mr. Wood has said, to add some observations as to the results which necessarily flowed from that action.

The Interstate Commerce Commission, in its report for 1920, makes the following summary of the action of the State commissions in the matter of passenger fares: Increases approved in full in 23 States; increases approved, with exceptions, in 7 States; no increases account statute, 13 States; increases denied, 3 States; increases denied in part, 2 States.

Commenting on that, I want to refer to General Order No. 28 of the Director General of Railroads, because I think it is particularly illuminative in the matter of these passenger fares. While the increases in the freight rates under that order were 25 per cent, with certain exceptions, that was not the procedure adopted with reference to passenger fares. At the time the order was entered there were 2-cent fare statutes and orders of commissions in a number of the States in the Middle West. Under the authority of the Interstate Commerce Commission, the interstate rates into, over, and across those same States, after a very full investigation, had been increased to 2.4 cents per mile.

Now, that was the situation when the order was entered. What the Director General did was to make a minimum basic passenger fare of 3 cents per mile. In other words, where the State fare was 2 cents, there was an increase of 50 per cent; where the interstate fare was 2.4 cents, there was an increase of 25 per cent; where the fares, as is true in many cases, particularly in the far West, were 3 or 3½ or 4 cents per mile, there were no increases whatever.

So that we have the recognition, and action in accordance with that recognition, by the Director General, the governmental authority, that the State and interstate fares in the same territory should be on the same level.

Senator FERNALD. Now, Judge, in the territories where the 4 cents per mile rate prevailed there was no change whatever?

Mr. SCANDRETT. No change at all; no. And the only increases that those fares received were under this Ex parte 74 decision. They had nothing during all the period of the war and during all these increases in expenses.

Bearing that in mind, and waiving for the moment the question of law, was it fair and proper that with these fares on the same basis of 3 cents per mile, State and interstate, that the interstate fares should be increased 20 per cent and the State fares in 23 States should be increased 20 per cent, while in 7 States the increases should be made only in part; in 13 States, because of State statutes, no increases whatever; in 3 States the increases denied by the State authorities; and in two cases increases denied in part? Now, I say, was that fair? I do not think that anybody can make the contention that it was fair. Certainly, Mr. Benton did not do it, and I have read his testimony very carefully. Mr. Benton avoids and begs the entire question when he says to this committee, on that feature, that the increases made by the Interstate Commerce Commission and by the State commissions which followed the lead of the Interstate Commerce Commission were too great and that they were more than the traffic would bear.

Well, now, that is a point of controversy. He may be right and he may be wrong, but it does not reach the question as to what was the fair thing to do as regards the State and interstate situation and as regards the situation between different States. So much for the propriety of it.

When you come to the law of the case, it seems to me that it is as plain that the situation that resulted was unlawful as that it was improper. I propose, in sustaining that statement, to advance three propositions:

First. That it was an unjust discrimination against interstate commerce.

Second. That it resulted in undue and unreasonable prejudices, preferences, and advantages as between State and interstate commerce.

Third. That the action of the State commissions, or of State authority where it was done by legislative enactment, constituted an unlawful regulation of interstate commerce.

I will take those up in order.

UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE.

On the question as to whether it is an unjust discrimination against interstate commerce to have a basic passenger fare of 3 cents per mile within a given State, and 20 per cent higher, or 3.6 cents per mile, on travel to that State from without, and from that State to points without and across the State. I say that it seems to me that the demonstration can be made beyond question to any man who will consider the question with an open mind.

The record in all of these cases—and it is a perfectly obvious fact—showed that this service, the interstate and the State service, was performed under substantially similar circumstances and conditions. In fact, a like service. It is not a case of an interstate traveler going over one railroad and a State traveler over another railroad; of an interstate traveler riding on one train ovver a given railroad, and a State traveler in another. They use exactly the same facilities. They may ride in the same smoking car or the same chair car or the same Pullman car; they may even ride in the same seat in the car, and the one pays 20 per cent more than the other. And that charge is imposed by a common carrier to whom the law says you shall not discriminate against interstate commerce.

Now, as Mr. Wood pointed out, it is perfectly plain, if you eliminate for the moment the word "unjust," that it is a discrimination, because a discrimination is a difference in treatment. And, very obviously, here is a difference in treatment. If you take the ordinary meaning—the common-sense meaning of unjust, it is equally an unjust discrimination, because that is unjust for which there is no justification; and there is no justification whatever, or nothing whatever to justify the carrier in imposing that different charge. Beyond all that, it is an unjust discrimination as defined by the interstate commerce act.

Mr. Benton, in one of his statements, said that unjust discrimination is a very loose phrase, and that there was no definition of it ,and consequently it was hard to tie to, but he very obviously overlooked section 2 of

the interstate commerce act, because what I have been describing here is the very definition of unjust discrimination as defined in that section. [Reading:]

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

In other words, unjust discrimination is the making of a different charge for a like service under substantially similar circumstances and conditions.

Not only that, under the Elkins Act, as I believe, the Interstate Commerce Commission could proceed by injunction against the carriers under the provision that authorizes such procedure where there is any discrimination imposed which is forbidden by the act.

Now, having shown that it is an unjust discrimination, is it an unjust discrimination against interstate commerce? If we have recourse to the plain, common-sense meaning of the words "interstate commerce," why, it is equally plain that this discrimination is against interstate commerce. Commerce, in one meaning of the term, is transportation, and interstate, of course, is between the States. Now, here is a higher charge, without justifying cause, imposed on this transportation between the States than is imposed on the transportation within the State. If that is not an unjust discrimination against interstate commerce, it is beyond me to conceive of a case that would come within that prohibition. It is a case, as it seems to me, where the mere statement of it is itself a demonstration, and it is so simple that that, of itself, makes you perhaps doubt its correctness, although it should not.

Now, Congress certainly is concerned as to the cause of this unjust discrimination. A discrimination imposed by State authority is just as abhorrent as one imposed by voluntary act of the carriers. It is the fact of discrimination that counts. If the discrimination is there, then the national body has said that it must be removed.

On this question of undue and unreasonable advantages, preferences, and prejudices: The statute uses "persons" and "localities" together, and I will do so, because it seems to me that they necessarily must be considered together. If I live in a given community and there is a discrimination against me, that is a discrimination also against the locality. And if you live in another community and there is a preference to you when you travel or ship, that is also a preference to that locality.

UNDUE PREFERENCES BETWEEN PERSONS AND LOCALITIES.

That this difference in the basic fare creates undue and unreasonable preferences, prejudices, and advantages is just as plain as the fact that it is an unjust discrimination. There are two people on the same train, and they are getting precisely the same service, and the one is paying 20 per cent more than the other.

That situation is State wide and extends throughout the length and breadth of the State. Whenever there is a man who boards the train to go to a destination within the State, it is 3 cents; if he boards the same train at the same place and his destination is beyond the State, his fare is 3.6 cents.

I think that frequently a diagram shows these things more clearly than any argument or statement, and I have here some blue-print maps which were used in our Nebraska case. I would like to file two of them with the reporter for the record and to give each of the Senators one while I briefly describe them. These are Exhibits 37, 38, and 39 in the Nebraska case, which resulted in the Interstate Commerce Commission increasing the basic passenger fare in that State from 3 to 3.6 cents.

If you will take the first one, Exhibit 37, I direct your attention to the top of the page, which shows the town of Oelrichs, in the State of South Dakota, and to the town of Fort Robinson, in the State of Nebraska. Now, passengers from each of those stations are going to Omaha. They make a short journey to the junction point indicated on the map, and then go on to Omaha on the

same train. The man from Oelrichs travels 479 miles and the man from Fort Robinson travels 476 miles. The man from Oelrichs travels 3 miles further; he gets 3 miles more of service, and he pays $2.96 more for those 3 miles of additional service.

At the bottom of the map are two points on the Union Pacific, and they are both within the State of Nebraska; they are Kelly, and Sidney. Now, it so happens that the man from Sidney who travels to Omaha dips down into the State of Colorado for a very short distance. Of course, he does not know when he gets into the State of Colorado and when he gets out; he crosses and recrosses an imaginary line. But he knows it when he pays his railroad fare, because while he travels the same identical distance as the man from Kelley, on the Union Pacific, he pays $2.47 more railroad fare. That is what the railroad charges him. It is perfectly plain that if it were not for the State law that the railroad could not have any possible justification for that difference in charge. The fact is that Kelly is on a branch line and Sidney is on its main transcontinental line, and if there should be any difference in charge it should be in favor of the man from Sidney, but instead of that he has to pay this higher charge.

These illustrations are typical, and we had many more of them in the State case, and you can find them throughout the State. I say they are only typical of a situation, and they demonstrate, beyond any question, a discrimination against persons, and a discrimination against interstate commerce.

Senator FERNALD. Just on this one moment, Judge: The man from Sidney goes but a short distance through the State of Colorado?

Mr. SCANDRETT. Yes, sir.

Senator FERNALD. But he has to pay the extra fare per mile for the entire distance from Sidney to Omaha?

Mr. SCANDRETT. Yes, sir.

Senator FERNALD. I see.

Mr. SCANDRETT. Unless—and this is shown on one of the other exhibits—he buys to the first station across the line, and then rebuys.

Mr. THOM. And that is a fraud on interstate commerce.

Mr. SCANDRETT. Yes, sir.

Senator FERNALD. Yes, sir.

Senator FERNALD. Now, suppose—I do not know that territory—but suppose on leaving Sidney there should be a depot just over the line in Colorado, he could get his ticket from Sidney to this depot, or station, and then buy on the intrastate rate?

Mr. SCANDRETT. Yes. Of course, he can buy on the intrastate rate.

Senator FERNALD. On the State rate; yes.

Mr. SCANDRETT. Yes. Now, on the next exhibit, No. 38, there is a slightly different situation displayed. Here we have Chadron displayed at the top of the map, on the Chicago & North Western Railroad. We have two men on this train, one going to Sioux City, Iowa, and the other going to Omaha, Nebr. And you will observe that they ride over the same rails for perhaps three-fourths of the distance, where one branches off to go to Sioux City. The man who goes to Sioux City goes 45 miles less distance, and gets 45 miles less service than the man who goes to Omaha, and although he gets 45 miles less service, he pays $1.23 more for that service.

That illustrates, I think, very clearly a prejudice against localities. The man can supply his wants, either for his house or store, or otherwise, in Sioux City, or in Omaha. He can go to Omaha for a materially less charge than he can go to Sioux City, and very obviously it results in more people going to Omaha than would have gone otherwise, and fewer people going to Sioux City.

In this connection I should say that in this Nebraska case we put in evidence as to this Sioux City situation, and we showed what had been the normal travel to South Sioux City, which is in Nebraska, just over the line, in normal times, under normal conditions, and what it was when this fare became effective on travel to South Sioux City by people who were destined to Sioux City, and then rebought on the train, or took automobiles or street cars across the river into Iowa.

At the bottom of that exhibit is another illustration of the same thing. Here is Bartley, Nebr., on the Chicago, Burlington & Quincy Railroad, the midway point between Omaha and Denver—practically midway—4 miles nearer to Omaha than to Denver. Omaha and Denver are competing markets, and a man has occasion to buy something in one of them. He can go to Omaha, within the

State, for almost $2 less than he can go to Denver. Very obviously that favors Omaha and prejudices Denver.

Now, on the last one, Exhibit 39, are typical illustrations of how interstate fares can be defeated, and the evidence in this case was replete with instances as to how they were. Take the first one there, in the center, on the Union Pacific—Julesburg and Barton. Julesburg is in Colorado, a short distance from the Nebraska line, and a man goes—and I am using all these in the present tense, but in point of fact, it is not now the case, because the Interstate Commerce Commission raised these intrastate rates. But that was true until that action was taken. A man goes from Julesburg to Omaha, and if he buys a through ticket he pays $13.11, but if he bought a ticket from Julesburg to Barton, and then to Omaha——

Senator FERNALD (interposing). Just a moment. From Omaha to Julesburg is $13.11?

Mr. SCANDRETT. Yes, sir. Now, if instead of that—and the statement is not very clear as it appears at the bottom of the sheet; but if he bought a ticket from Julesburg to Barton he could get it for 24 cents, and then if he bought his ticket from Barton to Omaha, which he could get for $10.70, making his aggregate expenditure $10.94, or a saving of $2.17 as against buying a ticket direct from Julesburg to Omaha. In other words, he could defeat this interstate fare which the Interstate Commerce Commission said was a just and reasonable fare, to the extent of $2.17 by buying to the first station across the line and then rebuying at that point.

At the bottom of the page is another illustration of the same thing. If a man from Concordia, in Kansas, wants to go to Alliance, in Nebraska, a distance of 510 miles on the Chicago, Burlington & Quincy Railroad, it will cost him $18.35. If instead of buying a legitimate through ticket from Concordia to Alliance he buys a local ticket from Concordia to Wymore, a distance of 81 miles, which he can do for $2.92, and then buys a ticket from Wymore to Alliance for $12.86, making his aggregate expenditure $15.78, he will effect a saving in his fare from Concordia to Alliance of $2.57. These illustrations are, as I say, merely typical, and they, to my mind, show conclusively two things—the discrimination against interstate commerce and the preference, prejudices, and advantages as between State travelers and interstate travelers, State localities and localities beyond the borders of the States.

Something has been said about competition being a prerequisite before discrimination of this kind should be removed by the Interstate Commerce Commission. To my mind, while competition accentuates and aggravates a situation, the discriminations and the prejudices and the preferences are there, irrespective of whether a particular community is in competition with another communty or a particular shipper or traveler is in competition with another shipper or traveler.

It seems to me that there are two aspects and that the second aspect is, perhaps, overlooked when this competitive feature is considered a prerequisite. The first is the effect upon the shipper or the traveler or the community or the commerce. The second aspect is the specific prohibition which is laid upon the carrier. In other words, the violation of the duty of the carrier. Now, that violation is just as much there whether there is competition or whether there is not competition. When the carrier imposes upon one traveler for precisely the same service a different charge than he imposes upon another traveler he violates this discrimination clause, and the fact that the travelers may or may not be in competition is of no significance. Always in these cases, in this general territory, with these different basic fares, the shipper or the traveler interstate suffers the prejudice, suffers the disadvantage, suffers the discrimination.

The CHAIRMAN. May I ask a question at that point? I regard your discussion now as touching a vital point in this subject. Did you recognize—I am speaking now of the carriers—in the years before this law was passed that in carrying through passengers or interstate passengers at a lesser rate than was charged on the same train for persons who were riding within the State you were guilty of discrimination? Did you recognize that when you issued a pass to one who had rendered no service to the company and rode free, that you were practicing discrimination against the State traffic?

Mr. SCANDRETT. Well, in regard to the pass, Senator, perhaps the railroads were slow to recognize it, but Congress certainly recognized it and Congress enacted legislation which prohibited it.

The CHAIRMAN. Yes; speaking about passes.

Mr. SCANDRETT. Yes; you mentioned passes.

The CHAIRMAN. Yes; but for years before we legislated upon passes and for years before the enactment of the present law—the transportation act—the interstate carriers continually transported passengers upon through tickets for a less rate than they charged to the passengers within the State on the same railroad, who were, as you suggest, being carried under the same conditions.

Mr. SCANDRETT. Well, to the extent that they did it, Senator, and there were not justifying causes, why, I would say that there was that discrimination in those former practices. You mentioned something of the same kind to Mr. Wood the other day—referring to excursion fares.

The CHAIRMAN. It to me is the most important question in this whole matter of what you allege to be discriminations—that the mere fact that a train carrying interstate passengers and State passengers than for interstate passengers is conclusive evidence of discrimination—that is, such discrimination as we have a right to correct. I assume, therefore, that if it is discrimination to carry a State passenger for less than the interstate rate it is also discrimination to carry the through passenger for less than the State passenger.

Mr. SCANDRETT. I think that is true, Senator, unless there are differentiating circumstances.

The CHAIRMAN. What seems to me inexplicable is that for years that has been true, and I have never heard that practice charged as discrimination.

Mr. SCANDRETT. I do not know whether we understand the facts alike. You have excursion fares. There may be an excursion rate put in for a fair at Des Moines, Iowa, and it will apply from State points and from interstate points. There may be excursion fares put in for some great exposition. Now, everybody who attends that exposition, whether he starts from a point within the State where the exposition is located or from another Sate, gets the benefit of that fare, and the commission has held, and I think properly, that there are justifying circumstances which warrant, for special occasions of that kind, reductions from the basic fare. But I do not think, Senator, that it has ever been the practice to make the basic fare for ordinary travel interstate on any different basis than within the State. For instance, the rate from, say, Kansas City to Chicago has always been based on a mileage rate via the short line between those points. Then the long lines have had to take a lower charge per mile to meet that competition. And, of course, the same thing is true within the State—that the short line makes the fare and the long line meets it. But I do not think there has been any discrimination between the State and interstate in the matter of these basic fares.

The CHAIRMAN. I will give you an illustration: For years in my State the fare on a first-class road was 3 cents a mile. Suppose I bought a ticket at Des Moines for San Francisco. I did not have to pay 3 cents a mile for it, and yet if I bought a ticket from Des Moines to Council Bluffs I had to pay 3 cents a mile for it.

Mr. SCANDRETT. Well, now, San Francisco is an illustration of the excursion——

The CHAIRMAN. Not an excursion; those were the regular rates. I am not speaking now about any particular occasion, but the regular rate per mile from Des Moines to San Francisco was less than 3 cents a mile.

Mr. SCANDRETT. Well, I say that those are in the nature of tourist rates. San Francisco is one of the great tourist resorts of this country, one of the national playgrounds. Those rates are made just the same as special rates are made to Yellowstone Park, or Glacier Park, or any national park, and everybody gets the benefit of them, and they are open to everybody.

The CHAIRMAN. But nobody can get the benefit of them who rides within the State?

Mr. SCANDRETT. Not unless they are located within the particular State. But certainly it seems to me that there are differentiating circumstances there. There are two factors; by making an inducement the railroad encourages travel to those resorts and does a larger volume of aggregate business than it would otherwise; and, on the other hand, it seems to me that it is very much in the interest of the general public to give them an opportunity to see these places.

The CHAIRMAN. Certainly; I am not questioning the policy of doing it at all, although I used to think it was somewhat abused. But you say that is discrimination, and I am not convinced that it is; that is all.

Mr. SCANDRETT. The only possible point of difference between you and me, Senator, is that I say that that transportation to San Francisco or to Yellow-

stone Park is not performed under substantially the same circumstances and conditions as the transportation from Des Moines to Council Bluffs.

The CHAIRMAN. It is in the sense that you use it, because the persons ride on the same trains, they have the same service; and as you remarked a few minutes ago, they can ride in the Pullman car, they can go into the dining car, and they have all the accommodations which the railroad furnishes. It is a new idea to me that that constitutes a discrimination which was prohibited by the interstate commerce act prior to the transportation act, and you will agree with me that if it is prohibited now it was prohibited then——

Mr. SCANDRETT (interposing). Absolutely.

The CHAIRMAN. Because there was the same language in regard to discrimination. The same language has been in the act for years that is now in it.

Mr. SCANDRETT. The distinction to my mind is entirely clear, that the circumstances and conditions differ and that there is justification for a lower fare for this special occasion to this particular point than for the every-day travel within the State or across State lines.

The CHAIRMAN. Well, now, I will put you another case: For years I could buy a ticket in Des Moines to Washington for less than 3 cents a mile.

Mr. SCANDRETT. My understanding is that your fare to Washington was based on a certain basic charge per mile from Des Moines to Washington via the short and direct line. Now, whether it was 3 cents a mile or 2½ cents at that time, or 2¼, I do not know; or unless it was during the time when the summer tourist fare was put in——

The CHAIRMAN. All the country can not be playground and subject to the conditions you have suggested. I am very much interested in your view of it. It may be that I am wrong about it, but it is a new view of discrimination to me.

Mr. SCANDRETT. I think, Senator, this is true, that it would be unfortunate, not only for the railroads but for the people as well, if it should be held that the making of a special fare to Yellowstone Park——

The CHAIRMAN. I am not speaking about that——

Mr. SCANDRETT (continuing). Could not be made——

The CHAIRMAN. I think it can be made.

Mr. SCANDRETT (continuing). If that fare could not be made without reducing the basic fares, State and interstate. It is entirely clear to my mind that the proposition that I am advocating is a clear case of injustice, discrimination, and undue preference and advantage, because in the cases I have brought to your attention there are no justifying conditions of whatsoever character.

I might put it this way: Let us take a State, let us assume that there is a rate of 3 cents a mile between A and B, and a rate of 3.6 cents per mile between C and D. Let us assume that the circumstances and conditions are substantially the same between A and B and between C and D, and let us assume that this difference in charge is the voluntary act of the carrier, and let us assume that we have a State commission which has the authority to prevent discriminatory charges. Let us assume that that railroad is haled before the State commission to explain why it is charging 20 per cent more between C and D than it is between A and B. I confess for one that if I were representing that railroad I would confess judgment. I would not know how to attempt to make that justification. The mere accident that A and B may be on opposite sides of an imaginary State line does not distinguish the case to my mind. I am entirely clear that any one of these State commissions, if the situation I have suggested were brought to their attention, would very promptly condemn that adjustment and require the carriers to straighten it out.

The CHAIRMAN. I stated the other day—you may not have heard me—that I had no doubt that a difference in the charge for riding on a train within the State and riding on the same train from a point in the State to a point outside the State, or from a point outside the State to a point inside the State, might become discrimination. I have no doubt about that. But I do not believe that the mere fact that there is a difference in the rate is conclusive evidence of discrimination.

Mr. SCANDRETT. Well, I think it is, if you grant the premise that there is nothing to justify the distinction that is made. Then every time the carrier charges two different fares for the like service it constitutes an unjust discrimination and undue preference and prejudice.

I have really been at a loss to understand the attitude of some of these State commissions. It seems to me, from the illustration I gave a moment ago,

that these State commissions in contesting the action of the Interstate Commerce Commission have undertaken to defend a situation which, as I say, they would very promptly condemn if it were within their jurisdiction. We have heard something about "frozen" rates. That is a question I am not going into, because Mr. Wood is going to discuss it, and he is going to show the extent of this freeze. But there is not any question whatever that in these Middle Western States, where the legislatures passed these 2-cent fare laws, those rates were frozen stiff in so far as the authority of the State commissions to control them was concerned.

The CHAIRMAN. Well, there is one exception—New York.

Mr. SCANDRETT. Well, that, I understand, is a question that is in controversy. I am referring to cases where the legislatures enacted these laws and gave no authority whatever to the State commissions to change or modify them.

The CHAIRMAN. Well, you are right about that in most of the States.

Mr. THOM. May I interpose here to say I think the chairman has in his mind as to New York an amendment made to the law since this controversy arose, and that amendment merely relates to the reasonableness of rates, and not to discrimination.

The CHAIRMAN. But that amendment was made before this present controversy arose.

Mr. THOM. I am talking about before the controversy over the New York rates arose.

The CHAIRMAN. At the time the carriers applied to the commission in New York for an increase in passenger rates that commission had the authority under the law to increase passenger rates upon a showing that the statutory rate was not a reasonable rate.

Mr. THOM. I think that amendment was passed in 1921.

The CHAIRMAN. Then I may be mistaken——

Mr. THOM. I think you are mistaken. I am giving that on the authority of Mr. Paulding, who is in the room, and who is intimately acquainted with the situation.

The CHAIRMAN. We were told the other day by the representative of the commission—and I assume that he knew what he was talking about—that at the time the application was made the commission had the authority to change the rate. But we can determine that later.

Mr. SCANDRETT. Now, we talk and we think a good deal about this State and interstate discrimination, but we must not ever lose sight of the feeling as between the different States. I am not going to elaborate that, but I am just going to refer to one incident. Senators will remember that the epidemic of 2-cent fare laws broke out and reached its maximum strength in 1907. It was in 1907 that most of these 2-cent fare laws were passed by these Middle Western States. It so happened that the Legislature of Kansas, which does not continue very late in the year, had adjourned at the time some of her sister States took this action. Nebraska, immediately north of Kansas, passed a 2-cent fare law. Following that the Railroad Commission of Kansas, in a very summary proceeding, reduced the passenger fares to a 2-cent level by an order; and the significant part of it, and the thing I wish to direct your particular attention to, was that they provided in that order that that fare should continue as long as the 2-cent fare was in effect in Nebraska. So that if the next day the Nebraska Legislature had repealed that act, or the carriers had succeeded in enjoining it, ipso facto the Kansas fare would have gone back to the old basis. Certainly that illustrates very clearly that it is not simply a question of State and interstate, but it is State and State.

Now, I want to draw your attention for a moment to the situation in Nebraska. And in what I say about the commission in Nebraska I do not want to be misunderstood. I have a very high regard for the members of that commission. To my mind they are very excellent men in every respect, and I think that in what they did in this matter of increases in rates after Ex parte 74 they acted on what was their best judgment. I think that they committed a very grievous error as to what their duty was. I think they were under a misapprehension as to what was required of them and what the law was.

Let us take a passenger train within the State of Nebraska, and let us analyze the situation. At the head end of that train we have the United States mail. The charge for that is regulated by the Government through the instrumentality of the Interstate Commerce Commission. We also have the express. The Interstate Commerce Commission authorized an increase in the express rates and the Nebraska commission authorized the same in-

crease in the State express rates, recognizing that the conditions were alike and that like treatment was required. Also in the head end of the train we carry milk and cream. The Interstate Commerce Commission authorized an increase of 20 per cent in the milk and cream rates, and the Nebraska commission did the same thing. They had authority. Prior to Ex parte 74 the Pullman Co. had applied for increases in its fares. The Interstate Commerce Commission allowed an increase on the interstate Pullman fares, and the Nebraska commission did the same thing, again recognizing that what was fair for one was fair for the other. In this Ex parte 74 the Interstate Commerce Commission authorized a surcharge of 50 per cent on Pullman passengers and the Nebraska commision did the same thing.

When it came to the basic passenger fare, the Interstate Commerce Commission said it should go up 20 per cent—from 3 to 3.6 cents. The Nebraska commission's hands were tied. There is no question whatever in my mind that if the Nebraska commission had been a free agent it would have allowed the same increase in the basic fare that was allowed by the Interstate Commerce Commission. It did not investigate the reasonableness of that basic passenger fare, because what was the use? It could not do anything with it. But the action that it took as to every other service on that passenger train—there can be no distinction between the fare per mile for the passenger and the Pullman charge and the milk and cream, the baggage, etc.—the action it took shows clearly that if it had been able to grant the like increase in the basic passenger fare it would have done it.

And what an absurd situation it is, Mr. Chairman, that on that passenger train, performing all of these various services, the State and interstate charges are fairly and properly related and on the same basis, with the one exception of the basic passenger fare per mile. So I say that in cases of that kind I can not understand the objection of the State commissions when such an obviously improper and unjust situation results from their inability to take action; I can not understand how they can oppose action by the only body which has jurisdiction of the subject matter—the Interstate Commerce Commission.

Senator POINDEXTER. There were cases pointed out by Mr. Benton—I only refer to his statement; I have not investigated the matter—where the Inter-State Commerce Commission declined to assume any authority to act.

Mr. SCANDRETT. I am talking here, Senator Poindexter, about passenger fares.

Senator POINDEXTER. I am talking about passenger fares, too.

Mr. SCANDRETT. I do not recall that there was any case where the Interstate Commerce Commission——

Senator POINDEXTER. The same principle would apply, however.

Mr. SCANDRETT. I think there was no case where the Interstate Commerce Commission, when the case came before it, did not increase the State fares to the same extent as the interstate fares, with the exception of commutation fares.

Senator POINDEXTER. This gentleman informs me that Mr. Benton referred only to freight rates.

UNLAWFUL REGULATION OF INTERSTATE COMMERCE.

Mr. SCANDRETT. My next proposition, Mr. Chairman, is that the prescription by State authority of a lower basic fare on State traffic than authorized by the Interstate Commerce Commission constitutes an unlawful regulation of interstate commerce. Now, I predicate that argument on premises which certainly will not be challenged by anyone, that under the Constitution Congress has the power to regulate interstate commerce, and under the decisions of the Supreme Court its power to so regulate is exclusive, and that its power may be exercised by the Interstate Commerce Commission, the tribunal created by Congress.

Now, in Ex parte 74 the Interstate Commerce Commission in the exercise of the power delegated to it prescribed a basic passenger fare through a wide stretch of territory of 3.6 cents per mile. I say it prescribed it, because it increased the former fare of 3 cents per mile by 20 per cent. Now, that was a regulation, obviously, of interstate commerce. I pointed out to you this morning the illustrations of how that interstate fare can be and is defeated by lower State fares by the opportunity that it affords to passengers on interstate journeys to buy to their State lines, and thereby make very substantial savings on what they would pay if they bought a through ticket.

The record in the Nebraska case—and all of these other cases in so far as I know those records—shows that that was done to a very considerable extent.

The fares prescribed by the Interstate Commerce Commission for interstate travel were not collected in many instances by reason of this lower State fare. Pro tanto, I say that that is a regulation of interstate commerce by the State.

I should like to direct your attention to an interesting case decided by the Supreme Court of Kansas some years ago. The title of the case is State of Kansas *v.* Dickinson (168 Pac., 838). In 1915 the carriers obtained some increases in interstate passenger fares in the western territory. Those increases were obtained through the Interstate Commerce Commission, and after a very protracted hearing and in the territory under consideration the increase was made from 2 cents per mile to 2.4 cents per mile. Just shortly before this increased fare interstate went into effect, as I recall it, the Kansas Legislature passed an act, which provided in substance that the railroad commission should take steps—perhaps I should read the language:

"Making it the duty of the public utilities commission of that State to require every interstate railroad to 'provide proper and convenient facilities within a reasonable distance of the State line for the stopping of every passenger train entering or leaving the State and for the alighting, safety, and protection of such passengers as desire to enter or leave such train at or near the State line, and to provide that such stop shall continue for such sufficient and reasonable time as the convenience and safety of the traveling public may require.'"

Acting under that statute, or, as the Supreme Court of Kansas said, constrained by the peremptory terms of the enactment, the commission ordered Dickinson, the receiver of the Rock Island Railroad, to provide these facilities at the point where the line went from Kansas into Missouri. Mr. Dickinson did not comply with the order, and a mandamus proceeding was instituted against him in the Supreme Court of Kansas by the Attorney General. The Supreme Court said of this statute:

"The purpose of the legislature was to provide a method whereby interstate passengers may, by buying tickets to and at specially provided State line stations, accomplish the Kansas portion of their journeys at the local rate of 2 cents per mile and so defeat the lawfully established interstate rate of 2.4 cents per mile."

Among other things set up in the answer of the railroad was that this was a regulation of interstate commerce, and on that the Supreme Court said:

"All the contentions of the defendant are sound * * *. The act should have been entitled 'An act reducing the interstate passenger rate for the mileage in Kansas to the intrastate rate.' That is the only true respect in which the public convenience and welfare are supposedly conserved. Public morals are indeed involved. The legislature undertook to provide a subterfuge whereby a regulation of interstate commerce, lawfully established under the authority of the Congress of the United States, the body invested by the Constitution of the United States with power over the subject, may be defeated. The police power, however, was reserved to the States to promote, and not to corrupt public morals. Except as indicated, the police power of the State is not involved, and the act directly affects the charges of interstate carriers for interstate traffic, and if enforced would deprive interstate carriers of a substantial portion of the revenues which they would otherwise derive from interstate passenger traffic."

The Supreme Court then went on to point out how by the use of this device the interstate passenger fares could be defeated, and then said:

"If the State of Kansas were permitted to adopt and enforce regulations of this character, other States could do likewise, and the commercial anarchy which led to the adoption of that provision of the Constitution of the United States which gives to Congress power to regulate commerce between the States would again exist. In this instance Congress has exercised its power over the subject of the statute, and through the agency of the Interstate Commerce Commission has established the fares which the defendant and other railway companies in its situation may charge for interstate passenger traffic."

And the act was held void by the Supreme Court of Kansas.

Now, I say that the prescription by the State authority of a lower basic fare on this State traffic than is prescribed by the Interstate Commerce Commission on interstate traffic in the same territory always and necessarily results in a regulation of interstate commerce, and circumvents the constitutional provision to which the Kansas Supreme Court referred. Legislation of the character condemned in that decision does not create the inhibited condition; all that that legislation did was to aggravate the existing situation. The thing that created

the discrimination was the maintenance under State authority of the lower basic fare for State traffic than for interstate traffic.

Similarly in Nebraska a 2-cent-fare law was passed in 1907, and the railroad commission appointed at that time and general order No. 1 of the Nebraska Commission, required every carrier to post in its stations a statement showing that the 2-cent-fare law of Nebraska was not applicable on nterstate traffic, and therefore that a traveler in Nebraska going on an interstate journey who desired to get the benefit of the lower intrastate rates should buy a ticket to the last point within the State, and then rebuy from that point.

So I say the railroads of Nebraska were required by the commission of that State to post a notice directing the attention of their patrons as to how they should act in order to defeat the lawfully established interstate fares. That order continued in effect until it was withdrawn, and, Mr. Chairman, the reason why it was withdrawn was that the interstate passenger fares had been forced down to the combination of the State fares. The carriers found t absolutely impossible to continue to charge their higher fare on the interstate travel. Public sentiment strongly opposed the necessity of buying and rebuying, and demanded that they publish as a through fare these combination fares. The result was that in all of these States the interstate fares were reduced to the level of the State fares.

A more frank bill was passed by the legislature of Wyoming. It was patterned somewhat on the bill in Kansas. It provided that certain facilities must be established at these State lines, and opportunities for passengers to get off and buy tickets, etc. It carried, however, the proviso that it should not apply to any railroad that constructed its fares by making them not higher than the combination of the State fares. That bill, as I say, was passed by both houses of the Wyoming Legislature and was vetoed by the governor. The governor was a very unpopular gentleman in that State after he vetoed it.

The CHAIRMAN. To test that theory you are just presenting—suppose all the States of the Union in the summer of 1921 had increased the State passenger rates higher than the interstate rates. Would there be the same discrimination, and would that give jurisdiction to the Interstate Commerce Commission to lower the rate?

Mr. SCANDRETT. Of course, it is rather difficult for me to meet you on that assumption, but I should say that if the State rates were made higher than the interstate rates there would be a discrimination against the States.

The CHAIRMAN. That is, a discrimination by the Federal authority against the State authority?

Mr. SCANDRETT. Well, there would be a discrimination, and I would say by the carrier as between its patrons. Now, I can not conceive of a legislature forcing a railroad to charge a higher State rate than was authorized for interstate carriers.

The CHAIRMAN. For years before this law there were States in the Union, plenty of them, that charged a higher rate on intrastate traffic than the railroads charged for interstate traffic.

Mr. SCANDRETT. Well, if you are coming back to your illustration, Senator, of tourist fares and excursions——

The CHAIRMAN. Well, your whole interstate traffic is not excursion traffic.

Mr. SCANDRETT. The point I made before, Senator—and I am confident I am correct—is that the basis for the interstate fares, when the carriers had control of the situation before these 2-cent-fare laws were enacted, was the same State and interstate. Now, your passenger situation is different from your freight situation. Your passenger rates are made on a mileage basis. For instance, from New York to Chicago, as I understand the situation, the rates were made on a continuous mileage basis over the short lines regardless of the State lines.

The CHAIRMAN. The conclusion you draw from that is that, entirely aside from the law we are now considering, the Interstate Commerce Commission has authority to fix all State passenger rates, because they are all so connected with interstate rates that they can not be separated?

Mr. SCANDRETT. I think so.

The CHAIRMAN. I thought that was the conclusion.

Mr. SCANDRETT. I had not finished my answer. I said, I think so. The reason I think so is that with your passenger fares made as they are, and with your passenger service performed as it is, the disparity in the same territory as between the State and the interstate to my mind necessarily produces the discriminations which are prohibited by the interstate commerce act.

The CHAIRMAN. No; you are treating it entirely independent of discrimination. You were using this opinion of the Supreme Court of Kansas, I take it, to establish the proposition that under our authority to regulate commerce among the States we have the authority to fix all State rates. That was the conclusion, was it not?

Mr. SCANDRETT. I come to that conclusion for this reason, Senator. It is based upon the way the thing works out in practice. I say this, that anything which requires a change in a rate prescribed for interstate commerce is a regulation of that commerce. Now, I say that in practice it has been shown that the railroads can not maintain these different basic fares, State and interstate.

The CHAIRMAN. So that the Interstate Commerce Commission, before this law was enacted, in your opinion had just as complete authority to reduce a State rate that was higher than the interstate rate as it had to enter into the inquiry as to discrimination and, if it found discrimination, to condemn the rate?

Mr. SCANDRETT. You said "reduce the State rate——"

The CHAIRMAN. If it is all interstate commerce, then, of course, the Interstate Commerce Commission had authority to fix State rates whether they were higher or lower.

Mr. SCANDRETT. I do not think that follows from your argument, for this reason, Senator, that if you have a higher State rate than the interstate rate, that will not interfere with collecting your published interstate rate; but if you have a lower one it will.

FREIGHT RATES.

Now, I want to take up rather briefly the question of freight rates. The Interstate Commerce Commission's report for 1920 shows that the action of the State authorities was as follows: Increases approved in full, 24 States; increases approved with exceptions, 17 States; smaller percentage increase allowed, 5 States; all increases denied, 2 States.

It will be noted that there were 17 States which the commission says approved the increases with exceptions. Most if not all of those, I think, were cases where the State commission said you may have a smaller increase on this commodity or that commodity, and in some cases they said as to certain commodities, no increases. Mr. Benton in his statement—and I will quote from pages 28 and 29 of the printed transcript—in referring to these exceptions said that "they were made according to the necessities of the local situation, as found by the commission." That is on page 28. And again, he said that these State commissions "modified the general advance as to some excepted commodities, so as to enable them to continue to move." And again he said, "The exceptions were on commodities where exception had to be made." These are Mr. Benton's explanations. So far as I have examined these opinions—and I have examined a good many of them rather closely—they are not always the reasons as stated in the reports of the State commissions. In many instances the State commissions gave no reason as to why they excepted a particular commodity, and certainly these reasons can not apply to some of the situations which we have disclosed in some of these various States. I shall refer to only one.

There is a coal field in southeastern Kansas and across this imaginary State line over in Missouri. It is all one field. In some cases the mines are not much more than a stone's throw from each other, one being in Kansas and one being in Missouri. The rates from those mines to destinations in Kansas prior to Ex parte 74 were the same, and, of course, all these Kansas and Missouri operators were in competition with each other. The Interstate Commerce Commission authorized an increase of 35 per cent from the Missouri mines to Kansas. The Kansas commission—and, as I recall, it gave no reason whatever for it—authorized varying increases, depending upon the rate per ton, and the average increase was substantially less than half of that made by the Interstate Commerce Commission.

The CHAIRMAN. These mines were supplying a common market?

Mr. SCANDRETT. A common market. For instance, a rate of $3 was increased under the Interstate Commerce Commission's order to $4.05, while the rate from the Kansas mine of $3 was increased to $3.35. In that case it will be observed that the increase was only about a third as much from Kansas as from Missouri. One man in Missouri testified in the Kansas case that that difference in treatment was costing him $800 a day. That was the disadvantage under which he was operating as compared with his competitor in Kansas.

Now, certainly in that case I can find nothing in the local situation which required the Kansas commission to take that action. I can find no reason why that exception "had to be made," as stated by Mr. Benton, and I do not find that that exception was made so as to permit this coal to move, as further stated by Mr. Benton.

The CHAIRMAN. That would seem to be a plain case of discrimination. I think nobody would doubt that upon that statement. That falls directly within the doctrine laid down in the Shreveport case.

Mr. SCANDRETT. I think that is entirely so, Senator Cummins. In point of fact, I will go somewhat further than you, perhaps, would be prepared to go at this time, because I contend that the Shreveport doctrine was broad enough to cover every situation that the Interstate Commerce Commission considered in these recent State cases. If I had time, I should like to develop that somewhat.

The CHAIRMAN. I am not prepared to deny that.

Mr. SCANDRETT. I did not want to commit you on it, but I did want to commit myself.

The CHAIRMAN. I do not know. That has to be determined on the evidence we have before the committee.

Mr. SCANDRETT. Now, the carriers have, as I say, been very severely criticized for bringing these cases to the attention of the Interstate Commerce Commission, and the Interstate Commerce Commission has been very severely criticized for the action that it took. But what would have been the situation now if the carriers after these State commissions had entered their orders, had acquiesced and had done nothing more? Would it have been fair to the people of the State of California, whose commission granted the full increase in freight and passenger business of 25 per cent on the freight and 20 per cent on the passenger, when the Nevada commission granted no increases whatever on either freight or passenger, with the result that everybody in California on his State traffic and on his interstate traffic would have been paying 25 per cent higher freight rates than formerly, and everybody in Nevada would have been paying the same on their State traffic as they did before. Take your own State, Senator Cummins. The Iowa commission did everything that it possibly could, everything that it had authority to do. Its passenger rates were frozen for it, but it granted the full 35 per cent on all of the freight rates within the State of Iowa, as I understand, without exception. Would it be fair to the people in Iowa to leave that situation as it was, while just across the river in the State of Nebraska the rates were increased only 25 per cent? Take the State of Oklahoma and the State of Kansas. The State of Oklahoma allowed the full increase in passenger fares from 3 cents to 3.6 cents. In Kansas the commission allowed nothing. Would it have been fair to have left that situation as it was? There is remedial legislation in the matter of procedure enacted by the transportation act which authorized the carriers to come to the commission and disclose these situations to the commission, and through that a result, after more or less delay, in some cases quite protracted, was obtained that placed this burden equally upon the State and the interstate business, and equally, as Mr. Thom reminds me, as between the States which had allowed the full increase and those which had not. I do not think that is the shame of the transportation act; as I view it, it ought to be its pride.

The CHAIRMAN. I think the transportation act—that is, from my standpoint—is right. I have no disposition, least of all men, to criticise the transportation act. I realize, and I think everybody must realize, that in a country like ours, with our system of government, we can not produce uniformity. It might be very desirable to have uniformity with respect to a great many subjects which we can not approach. The laws, for instance, of negotiable paper were so diverse that great injustice was done every day, and if Congress could have made a uniform law governing the rights and relations of parties to negotiable paper, undoubtedly it would have done it long ago. But when we came to the remedy we found it necessary, as you all know, to seek the action of the States, and the American Bar Association for years led a movement to secure from the various States such uniformity as might protect the holders or owners of negotiable securities.

I do not believe that under our Constitution we can get uniformity in everything; I do not think it is possible.

Senator POINDEXTER. I want to ask you a question and get your views on it about that case of the coal fields, where coal was shipped from Missouri, we will say, to a point in Kansas, to the market, and from a mine almost adjoining in

Kansas to the market in Kansas. Suppose the coal in Kansas to the market in Kansas were carried on another line, another railroad, wholly within the State, engaged in no other business at all except intrastate business, and that road made a rate of $3.35 a ton, while the interstate road, with the coal from the adjoining mine, made a rate of $4.05 a ton. The discrimination would have been just the same as though the coal were all shipped on the same interstate line. What would you say as to the power of the Interstate Commerce Commission to interfere with that rate on the wholly local line?

Mr. SCANDRETT. I do not think it could, on the premise of the statement that it is doing nothing but intrastate business. Of course, in practice there is no such case, but if it arose I suppose that the interstate carrier would put its mine in competition with the mine located on that State carrier—that is, if it had control of the situation.

Mr. THOM. May I say just one word there? Whatever may be the power of the Interstate Commerce Commission under existing legislation, it is my opinion that Congress would, under the power to regulate interstate commerce, have absolute power to protect the instruments of interstate commerce against unfair competition by State agencies.

Senator POINDEXTER. I asked the question in order to bring out views on it. It is a very nice question, and one that has got to be settled, and we seem now to be confronted with the duty of settling it.

Now, I want to ask you another question. These two conflicting rates that you described—and that is a very clear illustration you made—not only should be under the interstate commerce act nondiscriminatory, but they must be reasonable, if the law is complied with. We will assume that both of them could not be reasonable—both from the same point, for the same traffic to the same point, the $4.05 and the $3.35 rate. We will assume that they both are not reasonable, and it is the duty of some authority to determine what is a reasonable rate. On the doctrine of chances, the State rate might be the reasonable rate. It might be alleged, at least, that that was the reasonable rate and that the rate fixed by the Interstate Commerce Commission was an unreasonable rate. What do you say as to what authority is to determine that question as to what is a reasonable rate as to rates fixed by the State authorities acting wholly within their jurisdiction and the rate fixed by the interstate authority, the national authority?

Mr. SCANDRETT. Why, I say this, Senator Poindexter, that the Interstate Commerce Commission necessarily must be the one whose judgment controls as to what is reasonable for the interstate traffic. It therefore must fix the reasonable interstate rate.

Senator POINDEXTER. Well, the same rule, we will assume, applied to the State commission acting within its jurisdiction.

Mr. SCANDRETT. Of course, the difficulty is that this rate making is not an exact science. In the last analysis it involves the exercise of an informed judgment. Two bodies of men equally well informed and equally intelligent, on the same state of facts, may reach different conclusions as to what is reasonable. Now, the question as to whether a rate is reasonable or not is not controlling when you come to discrimination. In other words, the fellow who is paying this higher rate will suffer whether the rate of his competitor is reasonable or unreasonable. So you have got to have one authority to fix the yardstick.

Senator POINDEXTER. That is very true, but that does not answer the question. It is true that he is entitled to have the discrimination removed, but if the discrimination is caused by one of the rates being unreasonable it should be removed by making that a reasonable rate.

Mr. SCANDRETT. That is precisely what the Interstate Commerce Commission did. If you will concede with me that there must be one authority to pass on questions of what is reasonable, that is precisely what the Interstate Commerce Commission does.

Senator POINDEXTER. It is the old question that was argued by Webster and Hayne, and I think their conclusion was that it must be submitted to the courts and finally the Supreme Court of the United States must decide the question. You claim the Interstate Commerce Commission can decide it?

Mr. SCANDRETT. I claim that the national authority must decide it, and that, under the law as we have it, the national authority is the Interstate Commerce Commission. In other words, I claim that the Federal Government must be the one which makes that decision.

The CHAIRMAN. As I gather it, what you mean is this: Suppose a State rate is attacked because it is discriminatory, that it discriminates against in-

terstate commerce. The State authorities are brought before the Interstate Commerce Commission to settle that controversy. I take it, then, that the Interstate Commerce Commission has the authority and it is its duty to examine the interstate rates and ascertain whether the discrimination can be best removed by a change in the interstate rate or by a change in the State rate. That must be so?

Mr. SCANDRETT. That is my point. May I read here two paragraphs from the syllabus in the case of American Express Co. *v.* Caldwell, 244 U. S., 617—the South Dakota Express case:

"When the Interstate Commerce Commission finds that interstate rates are unduly discriminatory as compared with competitive intrastate rates and orders that the discrimination be abated, a further finding that the interstate rates are not unreasonable implies authority to the carrier to maintain them and to raise the competitive intrastate rates to their level.

"But findings that such discrimination exists and that the interstate rates are reasonable do not necessarily imply a finding that intrastate rates are unreasonable; both may be reasonable and yet produce discrimination; it is a relative matter."

The CHAIRMAN. Well, I do not believe that.

Mr. SCANDRETT. Well, I have to believe it.

I participated in the hearings before four State commissioners and in the subsequent proceedings involving the questions of discrimination in certain of those States. Those States were Wyoming, Utah, Idaho, and Nebraska. Now, speaking only of the freight rates, the Wyoming commission granted the full increase as allowed by the Interstate Commerce Commission, so there was no case. The same thing was true as to Idaho. Utah granted all of the increases except on coal and ore. Nebraska granted a 25 per cent increase instead of a 35 per cent increase, and also made some exceptions to its percentage increase. I think Utah and Nebraska illustrate the situation very well.

Proceedings in both cases were instituted before the Interstate Commerce Commission. I can not take the time to go into a detailed consideration of them, but it was contended by the carriers in Utah that there were the same reasons for increasing those rates on coal and ore as had actuated the Interstate Commerce Commission in increasing the interstate rates, and that discrimination resulted. The Interstate Commerce Commission disagreed with us and dismissed our petition in so far as that was concerned, and the exceptions made by the Utah commission as to coal and ore are still in effect.

Now, when we came to Nebraska the Nebraska commission, as I view the situation, very seriously misinterpreted the law. This transportation act had provided that the commission should establish such groups as it thought proper—divide the country into those groups. The Nebraska commission proceeded on the theory that Nebraska should be a separate group. Nebraska was in the western group as defined by the Interstate Commerce Commission, and if Nebraska had a right to carve out for itself another group, why, every other State had a similar right, and we would have had 48 groups plus the four created by the Interstate Commerce Commission, making 52.

And then I think Nebraska made another mistake in that they undertook to find what increases would be necessary in order to give the carriers a 6 per cent return on their Nebraska business. And when I say Nebraska business I do not mean simply business within the State of Nebraska, but the business from the outside and to the outside and across the State. In other words, the Nebraska commission took into consideration all of the business of the Nebraska lines, and they reached the conclusion that 25 per cent was the proper increase.

Now, the Interstate Commerce Commission had reached a very different conclusion. They had reached the conclusion that it should be 35 per cent. The Nebraska commission said as to that that they did not have any control; that, in fact, they were not concerned with the fact that while they were only allowing 25 per cent increase the interstate increase was 35 per cent. In other words, they said that all of these rates, State and interstate, ought to be increased only 25 per cent, but we have control only over the State, and so will increase the State rates 25 per cent, and we are not concerned with the fact that the interstate rate is 10 per cent higher.

If I had time I would like to take up the Nebraska case and outline to the Senators in some detail the showing which was made in that case to establish our contention that this action of the Nebraska commission resulted in an unjust discrimination against interstate commerce, and undue preference and advantage to State commerce. Perhaps I can go into it very briefly.

In 1907 there was what was known as the Aldrich bill passed in Nebraska, and it reduced all freight rates on important commodities, some 12, 15, or 18—lumber, grain, livestock, coal, etc.—15 per cent. So we had a legislative enactment as to what was in its judgment a reasonable rate on these commodities. I should say in that connection that since then there have been a number of discrimination cases brought before the Interstate Commerce Commission because of those reductions, and in every one of those cases when the facts were fully developed before the Interstate Commerce Commission the Interstate Commerce Commission found that the higher interstate rate was reasonable, but also that there was this discrimination, caused by this lower scale of rates prescribed by the Aldrich bill. All of those cases were decided some time before the transportation act.

There was another case involving all of the class rates from important distributing points into Nebraska. Those interstate points—Sioux City, Iowa, Council Bluffs, Iowa, St. Joseph and Kansas City, Mo.—contended before the Interstate Commerce Commission that there was an unjust discrimination by reason of the fact that the rates from jobbing centers within the State of Nebraska—Omaha, Lincoln, etc.—were on a lower scale. Those lower rates had been prescribed by the Railroad Commission of Nebraska. That case was very thoroughly tried and presented, and the Interstate Commerce Commission found there was an unjust discrimination. Now, it did not simply order its removal, but it prescribed what was a just and reasonable scale for interstate application, and, as appears from its opinion, it took this scale that had been prescribed by the Nebraska commission and examined it to see whether that would in its judgment be a just and reasonable scale, and reached the conclusion that it would not. So it prescribed what it thought would be a just and reasonable scale, and then ordered the carriers to remove the discrimination, which the carriers did by using this yardstick so made by the Interstate Commerce Commission. So we had the finding of the Interstate Commerce Commission as to what would be just and reasonable rates, and a just and reasonable relationship. Of course, it is perfectly apparent that when these interstate rates which were on the same level were incrased 35 per cent and the State rates increased 25 per cent, that discrimination which had been removed was recreated.

The evidence in this case also went in great detail to the movement of live stock, grain, coal, and the principal commodities, and showed the preferences and advantages that the State localities and the State shippers had as against the interstate shippers. Take grain, for instance. The rates from Nebraska to points in the East are made on the combination on Omaha. In other words, there are local rates into Omaha, and then proportional rates that take that grain out. Well, the result of this 35 per cent on interstate rates and 25 per cent on State rates was that the rate from a given point in Nebraska to Omaha depended on whether the final destination of that grain was Omaha or whether it was to be reshipped. In other words, two men ship from the same station in Nebraska, one of the shipments goes to Omaha, going into an elevator and is subsequently reshipped. His charge for the service from the initial point to Omaha was 10 per cent or, I think, from a representative station, about 2 or 3 cents a hundred higher than the man who shipped grain to Omaha which was there consumed and had no further transportation service.

The CHAIRMAN. I want to suggest to you, Mr. Scandrett, while I do not speak for the committee I feel sure that I understand their views on some things. There is not any doubt, I think, in the minds of the committee with regard to the necessity of the Federal authority in cases of actual discrimination. There is not any doubt about that, and I think it would not serve any useful purpose to enlarge upon that question. Wherever it is shown to the Interstate Commerce Commission, by evidence submitted to it, that a State rate discriminates against interstate commerce in the sense laid down by the Supreme Court in repeated decisions, there is no inclination on the part of the committee to withdraw that authority from the Interstate Commerce Commission at all.

The question that has been presented by the State commissions is that the Interstate Commerce Commission proceeded upon the theory that the rates must be uniform, and that it would assume discrimination if it were shown that the rates were not the same.

Mr. SCANDRETT. That is precisely the purpose of showing these facts to meet that contention.

The CHAIRMAN. Now, the question is not what happened before the State commissions. The question is what happened before the Interstate Commerce Commission, and whether this law needs any qualification in order to make it clear that it is only in cases of actual discrimination that Congress intended that the Interstate Commerce Commission should interfere.

Senator POINDEXTER. Mr. Chairman, I think it might be well to direct the attention of witnesses to the reason that was given for that holding, as it is claimed, by the State commissions. They claim that that order was based on the theory that any State rate which was lower than an interstate rate discriminated against the railroads as agencies of interstate commerce, because it did not produce its share of the revenue, and solely upon that decision assumed jurisdiction to order it to be raised. I would like to hear from the railroad representatives on that particular point.

The CHAIRMAN. That is true; that supplements what I have just said. I do not know just how to express it, but we are very anxious to get through with these hearings, and in view of the other engagements of Senators and the fact that we will probably adjourn about the 23d, we want whatever is said here to be reduced to its minimum terms, that is, in point of time. We understand your statement, I think, pretty thoroughly. You have made yourself very clear.

Mr. SCANDRETT. I may have taken more time than I should have, Senator, but I have curtailed very much the presentation I intended to make.

The CHAIRMAN. I am only suggesting that we must finish the hearings before very long.

Mr. SCANDRETT. I had about reached the point where I was going to discuss these specific amendments. I thought maybe the committee would like to hear that.

The CHAIRMAN. I would like to hear that, but we can not go on any further to-day, and we have got to hear Mr. Fisher to-morrow morning.

Mr. THOM. May I just say one word on this question of time? The proposals here are the most fundamental that have ever been brought before the National Congress. They have been discussed several weeks by the parties that support them. While I entirely appreciate the propriety and the necessity of reducing to the shortest possible time compatible with adequate presentation the statements that are made, I hope that it will not be beyond the convenience of the committee to permit an adequate presentation of our view in response to one that took these other gentlemen so long to present.

The CHAIRMAN. We intend to hear you.

Senator FERNALD. I believe, Mr. Thom, that in fairness to the railroads we ought to complete these hearings soon. We have been weeks and weeks and if there are any cases that have not been cited, from my extensive study of the law in the different States I fail to recall them. It seems to me we ought to conclude these hearings and begin to legislate on this question.

Mr. THOM. I just do not want you to conclude them before we get our views fully before you, Senator.

Senator FERNALD. I do not want to do that.

The CHAIRMAN. You will all remember that this hearing is not the beginning of this investigation. We have been considering this subject for a long time, and considered it at very great length when we enacted the transportation act.

Mr. THOM. And now it is proposed to stampede the committee, as I think, by the possibility of an abandonment of the opportunity for that presentation. I want an opportunity at least of getting our view before the committee.

The CHAIRMAN. You shall have the opportunity. I am only suggesting that there are some things that you ought to take for granted. You must assume that the committee knows something about the subject and does not need to be instructed upon every phase of it.

Mr. THOM. Well, Senator, we certainly appreciate that, and we hope we will in our presentation.

The CHAIRMAN. It is the natural tendency—and I know, because I indulge in it very often—to treat every audience as a kindergarten and to develop the matter from the beginning. That is in a way logical, but we have not time to do that.

Mr. THOM. Yes; but at times it is necessary to restate thoroughly well settled and recognized principles in order to connect them up with the conclusion that we draw.

(Thereupon, at 12.25 o'clock p. m., the committee adjourned until 9.30 o'clock Friday, November 18, 1921.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

SATURDAY, NOVEMBER 19, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment at 10 o'clock a. m., in room 410 Senate Office Building, Senator Bert M. Fernald, presiding.

Senator FERNALD. The committee will come to order. We will further hear Mr. Scandrett this morning.

I want to say, first of all, that the chairman is necessarily absent this morning at another important meeting, and he has advised that he is desirous of concluding the hearing as early as possible, Judge Scandrett, and I assume you will want to get away also, so that you can conclude your remarks this morning.

Mr. SCANDRETT. How much time will I have, Senator?

Senator FERNALD. At least a couple of hours, probably.

Mr. SCANDRETT. I hope to conclude in that time, at least, and perhaps in a shorter time than that.

Senator FERNALD. Of course, it is possible we shall be called to make a quorum, or to vote on a proposition on the floor, but otherwise you shall have at least two hours. You may proceed.

STATEMENT OF MR. H. A. SCANDRETT—Resumed.

Mr. SCANDRETT. Mr. Chairman, before taking up my statement at the point I left it on Wednesday last, I want to correct a statement which perhaps has created an erroneous impression, and which has been called to my attention by Mr. Clark, former chairman of the Interstate Commerce Commission. I had stated that the normal basis for constructing through-passenger fares was on a continuous mileage, regardless of State lines, and I had referred to a time before these State statutes had been passed, reducing the fares within the States. I was unfortunate, however, in one of my illustrations, the fare from New York to Chicago. That fare, prior to Federal control, was not constructed on a continuous mileage basis, and the reason for that was the 2-cent fare in the State of Ohio.

The Pennsylvania Railroad makes the fare, being the short line between New York and Chicago, and that fare, throughout the length and breadth of Pennsylvania was 3 cents per mile, but when it came to the Pennsylvania-Ohio boundary, it encountered this 2-cent fare, and this combination fare of 3 cents through Pennsylvania, 2 cents in Ohio, and 3 cents beyond, was published as the through fare.

While I was incorrect in stating how that fare was made, it is only another illustration of what I had been pointing out as to the making of interstate fares by action of State authority. In other words, the 2-cent law in Ohio had the direct effect of reducing what would otherwise have been the fare between New York and Chicago.

I want also to refer to a question which was put to me by Senator Poindexter, and I want to state that I have this copied from the reporter's notes—that "They (apparently referring to the State commissions) claim that that order (the Interstate Commerce Commission's order) was based on the theory that any State rate which was lower than an interstate rate discriminated against the railroads as agencies of interstate commerce, because it did not produce its share of the revenue, and solely upon that decision assumed jurisdiction to order it to be raised."

Now, if that impression has been created in the minds of the committee, it is entirely erroneous. The Interstate Commerce Commission went to the law, and to the explicit statements in the law, to find its jurisdiction. And the provisions were those which authorized it to remove discriminations against interstate commerce, and undue preferences, advantages, and prejudices as between persons and localities. It is a fact that, without justifying conditions, there is a lower level of rates in the State than the interstate level, without any conditions justifying a differentiation between the State and interstate rate, I think that that is of itself, a discrimination against interstate commerce. But the Interstate Commerce Commission did not go to that extent, and did not need to go to that extent, as I say, but founded its decision on the precise provisions incorporated in the act.

Now, at the time I concluded on Wednesday, I was discussing the Nebraska freight-rate situation——

Senator FERNALD (interposing). As Senator Poindexter has just come in, Judge Scandrett, I think it might be well for you to go over that matter again which was raised by Senator Poindexter's question or remark.

Mr. SCANDRETT. Yes. I had read, Senator, your statement as to the basis of the claim made by the State commissions of the jurisdiction assumed by the Interstate Commerce Commission, which was that it assumed jurisdiction to raise those State rates, on the sole ground that a lower level of rates within the State operated as a discrimination against the railroads, an agency of interstate commerce, and I said that if that impression had been created it was an entirely erroneous one, because the Interstate Commerce Commission had confined itself squarely within the four corners of the law and had expressed its jurisdiction because it found that under substantially similar circumstances and conditions there was this lower level of rates, and that it resulted in undue preferences, advantages, and prejudices as between persons and localities and an undue discrimination as to interstate commerce.

I said further, speaking only my own personal view, that I think that if there is a lower level of State rates than interstate rates—a lower level of State freight rates or passenger rates—without justifying conditions to differentiate it from the interstate adjustment, that that is in and of itself a discrimination against interstate commerce, but the Interstate Commerce Commission did not have to and did not go that far in these decisions.

As I said, when I concluded on Wednesday, I was discussing the Nebraska freight rate case and in the interest of conserving time I am not going to go into that further than to say that there was evidence before the Interstate Commerce Commission as to every commodity that moves in volume, State and interstate, as to all of the classes, and that there was affirmative evidence showing the lower level of rates, and the affirmative finding by the Interstate Commerce Commission that there were no conditions which warranted or justified that lower level, and that the showing was such that under any interpretation of the Shreveport decision the facts were brought squarely within the rule of that decision.

Mr. THOM. And also specific evidence of discrimination in that case.

Mr. SCANDRETT. Yes. Now, I think it is also interesting to note that when we had this proceeding involving the question of the Nebraska rates before the Interstate Commerce Commission it was set for hearing at Lincoln, Nebr., where the interested parties resided. The Interstate Commerce Commission in all these cases set the hearings in the particular localities that were interested. And though this hearing was held at Lincoln there was but one shipper who appeared in opposition to the petition of the carriers, which was that the Interstate Commerce Commission should prescribe the same rate on the State traffic as that prescribed on interstate traffic, and that was a gentleman who represented the sand and gravel interests; and I should say in that connection that subsequent to the hearing the sand and gravel rates, State and interstate, were worked out, through the cooperation of the State commission of Nebraska with the Interstate Commerce Commission, and so far as I know they are entirely satisfactory at this time. Now, while there was that one appearance in opposition to the carriers' petition, there were many appearances in support of the petition. The cities of Sioux City, Iowa, Council Bluffs, Iowa, Kansas City, and Omaha. The Grain Exchange of Omaha, Nebr., also appeared because of this difficulty in the grain rates to which I referred on Wednesday.

The Omaha Grain Exchange, in order to protect itself, had to advise the carriers that every shipment consigned to Omaha from points in Nebraska was intended ultimately to be shipped beyond, and therefore they asked the car-

riers to apply a higher rate than would have been applicable if the final destination had been Omaha.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION WERE WITHIN THE RULE OF DECISION IN THE SHREVEPORT CASE.

I want to refer somewhat briefly to the application of the rule in the Shreveport case to these various State cases. I will not undertake to enumerate all the respects in which the transportation act manifested an intent to confer additional powers, and did confer very broad additional powers, on the Interstate Commerce Commission. You are all familiar with those changes that were made; and when we get our second breath I am entirely confident that it will be found that these predictions of disaster that have been made on behalf of the State commissions will be found to be groundless and that this transportation act will work. It has not yet had anything like a fair trial.

I do not go into those changes because I am undertaking to meet the contention of the State commissions that the Interstate Commerce Commission exceeded its authority, and I meet it by undertaking to show that what they did they could have done under the old law; and certainly if they could have done it under the old law they could have done it under the new law.

While the decision of the Supreme Court in the Shreveport case was clearly foreshadowed in the decision of the Supreme Court in the Minnesota rate case, it was so sweeping in its prohibitions against anything which interfered with the free flow of interstate commerce that I think that its full import and the full extent to which it goes has not even yet been correctly apprehended in certain quarters. There has been a great deal of discussion about this statement of law and that statement of law in the decision, and I think we sometimes overlook the very simple state of facts which was before the court in that case.

Now, what were the facts in the Shreveport case and what was the order of the commission which was affirmed or approved by the Supreme Court? We had Shreveport, in the State of Louisiana—and I am reducing this to its lowest terms—and Dallas, in the State of Texas. The commission found that the rates from Shreveport toward Dallas were very materially higher than the rates from Dallas toward Shreveport, and that the traffic from Shreveport toward Dallas was interstate, and that the traffic from Dallas toward Shreveport to a point midway was State, and that the tariffs prescribed on this traffic from Dallas toward Shreveport were those fixed by the Railroad Commission of the State of Texas. It further found that the traffic from Shreveport and Dallas was handled under substantially similar circumstances and conditions.

I want to quote just one sentence from the decision of the Interstate Commerce Commission. It said:

"The orders of a State commission enforcing a discrimination against interstate commerce are not acceptable under the law."

The Interstate Commerce Commission ordered the removal of that discrimination, and, as I have said, the Supreme Court affirmed its order.

In these recent cases, the evidence brings the facts squarely within the four corners of that decision.

Let us look at it this way for a moment: Let us assume that at the time Shreveport brought this proceeding, there were proceedings brought by the border cities all around the State of Texas; and let us assume further that the showing that was made by Shreveport was made by each one of those border cities. Now, it is perfectly apparent that the order of the Interstate Commerce Commission entered in the Shreveport case would have been the order entered in each one of these other cases, and at that time, though in different proceedings, another adjustment of rates, State and interstate rates, would have been prescribed by the Interstate Commerce Commission.

Now, by reason of the change that you made in the transportation act, the carriers were permitted to institute those proceedings, and as a result of that, the Interstate Commerce Commission instead of being required to make a piecemeal readjustment through the bringing of successive cases, was authorized to, and did, review the entire adjustment. But when they had that entire adjustment before them, they viewed it just exactly as they did the Shreveport case, and only to the extent to which they found those discriminations and those preferences, prejudices, and advantages, did they order their removal.

Senator POINDEXTER. That is, as I understand the situation, a flat conflict of a statement of fact between you and the representatives of the State commissions. They deny that there was any investigation whatever made as to discrimination against interstate shippers; they say that a sweeping order is made, based solely on the fact of a difference in the rate.

Mr. SCANDRETT. Senator Poindexter, I say that that is unqualifiedly wrong so far as the cases with which I am personally familiar are concerned. And I say, that unless the Interstate Commerce Commission deliberately misstated the facts in its report in these cases, it can not be true in any case, because the findings were made by the Interstate Commerce Commission in each of those cases, and in each of those cases they pointed out typical illustrations of those discriminations, and of those preferences and advantages. And so that contention which you say is advanced by these gentlemen can only be true if the Interstate Commerce Commission deliberately falsified its records.

Senator FERNALD. Mr. Scandrett, the Senate is in session, and we will have to adjourn the hearing for a little time until we go to the Senate to make a quorum.

(And thereupon the proceedings and hearing were suspended, until the members of the committee returned from the Senate.)

HEARING RESUMED.

Senator FERNALD (presiding). You may proceed, Judge Scandrett.

Mr. SCANDRETT. There is a good deal more that I could say on this particular question that I was discussing—the application of the Shreveport doctrine. But the former chairman of the Interstate Commerce Commission, Chairman Clark, is to follow me on the stand, and he is so much more famliar with exactly what the commisison did, and its reasons for doing it, that I am going to leave it at this point.

Mr. THOM. Before leaving that, you might state that that case was not brought by the citizens of Shreveport, but by State authority.

Mr. SCANDRETT. Yes; I had intended to direct attention to that later, but I might as well do it now. This Shreveport case was not a case which was instituted on their own motion by citizens of Shreveport, but it was instituted by the Railroad Commission of Louisiana, at the direction of the legislature of that State, which, in its resolution, said that it desired, if possible, to find some way of relieving these discriminations against Louisiana which were brought about by the action of the Railroad Commission of the State of Texas.

"UNDUE BURDEN" VS. "DISCRIMINATION."

I want now to discuss for a few moments the question of the undue burden—if I may put it this way—versus unjust discrimination.

It has been repeatedly asserted in these hearings that the elimination of the phrase "undue burden on interstate commerce" by the conference committee which had in charge the transportation act restricted the power of the Interstate Commerce Commission over State rates.

I think a brief history of the legislative record is sufficient to answer that assertion. I can not speak, as some others have spoken or purported to speak, as if they knew what was in the legislative mind, but I have examined the records, and in the case of an unambiguous statute—and that is what I consider this is—we must assume that the legislative body intended that the law should be construed the way it was written.

The railroad bill which passed the House and that which passed the Senate differed in a number of respects, and, of course, the purpose of the conference committee was to reach an agreement. In some instances the conference committee adopted the phraseology of the House bill and in some instances it adopted the phraseology of the Senate bill and in still other instances it adopted neither. The bill as it passed the House contained, as an amendment to section 13, a provision condemning as unlawful and authorizing the Interstate Commerce Commission to remove any undue burden on interstate or foreign commerce, but it contained no reference whatever to an unjust discrimination against such commerce. On the other hand, the Senate bill contained an amendment to the same section authorizing the Interstate Commerce Commission to remove "unjust discrimination against interstate commerce," but contained no reference to an "undue burden on interstate

commerce." In this instance the conference committee adopted the language of the Senate bill and rejected the language of the House bill. That is the history.

It remains to consider what the effect was of that action. Possibly there may be difference of opinion, but to my mind there isn't any basis for a difference of opinion, because, in my opinion, it is clear that the language of the Senate bill, which became the law, was stronger than the language of the House bill. "Discrimination" is a broader term than "burden," and the term "unjust discrimination" is a broader term than "undue burden." Any burden on interstate commerce is a discrimination against that commerce, but all discriminations are not burdens.

Webster's dictionary defines "burden" as that which is borne with labor or difficulty, while "discrimination" is defined as a difference or distinction in treatment. A "burden," I say, is a narrower term than "discrimination," and, in fact, "discrimination" comprehends all that is included within the meaning of the word "burden."

And so I say that instead of the conference committee weakening the language which was in the House bill, it, by adopting the language of the Senate bill, strengthened that language and conferred broader powers on the Interstate Commerce Commission than it would have had if the House bill had been passed.

I had in mind to advert briefly to some of the charges which Mr. Benton has made as to bad faith of the carriers in instituting these proceedings before the State commissions, and as to the action of the Interstate Commerce Commission in taking jurisdiction, but I do not believe it is worth while to go into those questions, and so I pass now to a consideration of the amendments which are before the committee.

ANALYSIS OF THE CAPPER BILL.

We have the Capper bill (Senate bill 1150) and the Nicholson bill (Senate bill 2510), and we have the amendments proposed by Mr. Benton on behalf of the National Association of Railroad and Utilities Commissioners.

I want to say at the outset that each one of these bills, or proposals, is a very sweeping measure and involves a complete reversal of not only the transportation act but of the act to regulate commerce as it was before the passage of the transportation act.

Speaking now to the question of discrimination in State rates, while different routes are followed, each one of these measures arrive at the same goal, the goal being to deprive the Interstate Commerce Commission of any control whatever over discriminatory State rates, and in making that statement I measure my words. That is the necessary effect of each and every one of these proposals.

Senator POINDEXTER. Is it your opinion that they would modify the doctrine laid down in the Shreveport case?

Mr. SCANDRETT. Absolutely; they would absolutely nullify it, Senator, and I think that is demonstrable from an analysis of the bills which I now propose to make.

I will take up first the Capper bill. That bill proposes to amend sections 3 and 15 of the interstate commerce act and to repeal paragraphs (3) and (4) of section 13, and section 15a of the same act.

Section 3, as the committee well knows, is what is known as the discrimination section, and is the section under which the Shreveport case was decided. The amendment proposed to that section is to add a proviso to paragraph (1), as follows:

"That the provisions of this paragraph shall not be construed to prohibit any State, through its proper regulatory bodies, from exercising full and complete jurisdiction for the regulation of intrastate traffic, which jurisdiction is hereby expressly reserved to the States."

Now, I say that the purpose of that proviso to take from the Interstate Commerce Commission the authority which the Supreme Court found it had under the original act to regulate commerce is entirely plain and requires no comment, but to make it doubly plain that that is the purpose the following amendment is proposed to section 15, which is the section which confers upon the Interstate Commerce Commission the authority to prescribe rates. [Reading:]

"That the provisions of this paragraph shall not be construed to apply to any individual or joint rate, fare, or charge, or rates, fares, or charges on

shipments moving wholly within one State, and that the jurisdiction to regulate all such intrastate rates, fares, and charges is hereby expressly reserved to the several States."

Senator POINDEXTER. What are you reading from now, Mr. Scandrett?

Mr. SCANDRETT. That is the Capper bill.

Now, then, I come to the amendments which the Capper bill proposes to section 13, and the paragraphs which are proposed to be amended, are those which were added by the transportation act, and which provide for the notification of the State authorities in case rates imposed by State authority are brought in issue in any investigation under the provisions of the act to regulate commerce, or in any investigation instituted upon petition of the carrier. They further authorize conferences and cooperation between the Interstate Commerce Commission and the State commissions, and also authorize the Interstate Commerce Commission, when it finds that State rates cause undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, to prescribe such rate as will remove the advantage, preference, or discrimination. The repeal of those two paragraphs of section 13 is in line with the proposed amendments to sections 3 and 15 above mentioned, the purpose being to deprive the Interstate Commerce Commission of all jurisdiction over discriminatory State rates.

Senator POINDEXTER. What are the interests back of the Capper bill? Do you know who is proposing that bill?

Mr. SCANDRETT. I do not, Senator. There is a great similarity between all these bills; that is, between the several amendments that are proposed. I think the amendments suggested by Mr. Benton go beyond even the Nicholson bill, although in some instances the amendments suggested by Mr. Benton and the Nicholson bill are in identically the same language.

I said that the Capper bill proposes to amend those sections. It does not. It proposes to repeal them so that there is nothing left there at all.

It also proposes to repeal section 15a of the act, which is the rate-making section, and the section which provides for the recapture of the so-called excess earnings, and the creation and administration of the general railroad contingent fund.

As I say, Senator, in answer to your question, I do not know what interests are back of it, but I assume the reasons for seeking a repeal of that section are those given by Mr. Benton in his statement, and which I have already endeavored to meet, and which Mr. Fisher yesterday, in my judgment, met very fully and very ably, and I will not go into it.

In furtherance of the plan to deprive the Interstate Commerce Commission of all jurisdiction over State rates, the proposed bill provides, in sections 5 and 6, as follows:

"SEC. 5. It is hereby declared to be the policy of Congress to permit the properly constituted State regulatory bodies to exercise full and complete jurisdiction over intrastate commerce, and that no provisions of the act to regulate commerce or of the transportation act, 1920, shall be construed to confer upon the Interstate Commerce Commission any power or authority to in any manner regulate intrastate commerce or the facilities used in connection with the transaction of such intrastate commerce."

Now, that is a declaration for the future. Here in section 6, which I now read, the author gives attention to the past.

"SEC. 6. That no order of the Interstate Commerce Commission heretofore or hereafter made requiring or purporting to require any carrier to establish, put in force, or maintain any rate, fare, charge, or classification applicable to the transportation of passengers or property between points wholly within one State, shall be of any force or effect whatsoever so far as respects such transportation."

Under that, as I view it, ipso facto, every order heretofore entered by the Interstate Commerce Commission and now in effect would be stricken off, and therefore to the extent that the present rates prescribed by the Interstate Commerce Commission superseded rates prescribed by State authority they would become unlawful. It is unnecessary for me, I think, to dwell upon that or to do more than merely mention the absolute chaos that would result from the enactment of that section of that bill.

Mr. THOM. Would it not also follow that all the old Shreveport orders would be stricken out?

Mr. SCANDRETT. Yes; that is what I say. Every order, whether it antedated the transportation act or not, would be stricken off.

Mr. THOM. May I ask you this: It also provides that the facilities of intrastate commerce shall be under the charge of the State commissions. Are they not, in fact, the same as the interstate facilities?

Mr. SCANDRETT. Absolutely.

Senator FERNALD. That would permit, Judge Scandrett, 48 different boards to make 48 different rates and regulations if they saw fit to do so.

Mr. SCANDRETT. Yes; absolutely, and it would allow 48,000 discriminations.

ANALYSIS OF THE NICHOLSON BILL.

I will take up next the Nicholson bill. It proposes to amend paragraph (4) of section 13 by the addition of certain language to that section. It is very similar to the amendment proposed by Mr. Benton. Mr. Benton's proposal incorporates everything, I think, that is in the Nicholson bill, and then a great deal more besides.

The Nicholson bill would restrict the power of the Interstate Commerce Commission to set aside rates imposed by State authority, except where there was competent evidence that they injured persons or localities engaged in interstate commerce "to such an extent as seriously to diminish the business of such person or persons or seriously to retard the growth and development of such locality or localities"; and were also found from competent evidence "to be unreasonable and noncompensatory under conditions existing in such State as to construction, maintenance, and operation of such carriers and under honest, efficient, and economical management."

A further proviso is added requiring the Interstate Commerce Commission to make a report of facts from the evidence in the record on which it bases its findings, and still another provides that orders heretofore made prescribing intrastate rates, etc., shall be of no effect after the expiration of 90 days from the passage of the act, "but the Commission, within such period, upon consideration of the record in any proceeding wherein any such order has been made, and without further hearing may, within the limits of the power granted by said section 13 as amended by this act make a new report and such new order as may be justified by the facts found therein and supported by said record."

It is entirely clear that the enactment of this law would very greatly curtail the powers of the Interstate Commerce Commission as defined by the Supreme Court in the Shreveport case, and I say in practical effect it would nullify that decision.

It will be noted that before the Interstate Commerce Commission could act it would be required, first, to find discrimination, and, second, to find that the State rate was unreasonable and noncompensatory.

It would change the present section in three important respects:

First. By requiring more evidence to justify a finding of discrimination;

Second. By removing from the category of discriminations which require action on the part of the Interstate Commerce Commission, discriminations against interstate commerce; and

Third. By requiring proof that the State rate was unreasonable and noncompensatory.

While the first two would be backward steps and should not, I think, be contemplated for the reasons heretofore discussed, there would still remain some field within which the Interstate Commerce Commission could operate, or, rather, for the operation of the power which the bill purports to leave with the Interstate Commerce Commission, were it not for the requirements of the provision that there must be a finding that the State rate is unreasonable and noncompensatory. I take it that the proponents of these measures mean by that language "noncompensatory," confiscatory. In other words, if this bill were enacted—and the Benton proposal is almost identical with this particular feature—no matter how discriminatory the adjustment, no matter how severely the interstate shipper was penalized by these State rates, there could be no relief unless there was a showing that the State rate was confiscatory. This, it seems to me, would be a most unfair burden to impose upon a shipper as a condition upon which he may have that to which he is entitled in common justice—a nondiscriminatory rate adjustment.

In point of fact, I do not think any shipper, as a practical matter, could carry this burden. No one who has ever participated in a confiscation case can min-

MODIFICATION OF TRANSPORTATION ACT, 1920.

SATURDAY, NOVEMBER 19, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment at 10 o'clock a. m., in room 410 Senate Office Building, Senator Bert M. Fernald, presiding.

Senator FERNALD. The committee will come to order. We will further hear Mr. Scandrett this morning.

I want to say, first of all, that the chairman is necessarily absent this morning at another important meeting, and he has advised that he is desirous of concluding the hearing as early as possible, Judge Scandrett, and I assume you will want to get away also, so that you can conclude your remarks this morning.

Mr. SCANDRETT. How much time will I have, Senator?

Senator FERNALD. At least a couple of hours, probably.

Mr. SCANDRETT. I hope to conclude in that time, at least, and perhaps in a shorter time than that.

Senator FERNALD. Of course, it is possible we shall be called to make a quorum, or to vote on a proposition on the floor, but otherwise you shall have at least two hours. You may proceed.

STATEMENT OF MR. H. A. SCANDRETT—Resumed.

Mr. SCANDRETT. Mr. Chairman, before taking up my statement at the point I left it on Wednesday last, I want to correct a statement which perhaps has created an erroneous impression, and which has been called to my attention by Mr. Clark, former chairman of the Interstate Commerce Commission. I had stated that the normal basis for constructing through-passenger fares was on a continuous mileage, regardless of State lines, and I had referred to a time before these State statutes had been passed, reducing the fares within the States. I was unfortunate, however, in one of my illustrations, the fare from New York to Chicago. That fare, prior to Federal control, was not constructed on a continuous mileage basis, and the reason for that was the 2-cent fare in the State of Ohio.

The Pennsylvania Railroad makes the fare, being the short line between New York and Chicago, and that fare, throughout the length and breadth of Pennsylvania was 3 cents per mile, but when it came to the Pennsylvania-Ohio boundary, it encountered this 2-cent fare, and this combination fare of 3 cents through Pennsylvania, 2 cents in Ohio, and 3 cents beyond, was published as the through fare.

While I was incorrect in stating how that fare was made, it is only another illustration of what I had been pointing out as to the making of interstate fares by action of State authority. In other words, the 2-cent law in Ohio had the direct effect of reducing what would otherwise have been the fare between New York and Chicago.

I want also to refer to a question which was put to me by Senator Poindexter, and I want to state that I have this copied from the reporter's notes—that "They (apparently referring to the State commissions) claim that that order (the Interstate Commerce Commission's order) was based on the theory that any State rate which was lower than an interstate rate discriminated against the railroads as agencies of interstate commerce, because it did not produce its share of the revenue, and solely upon that decision assumed jurisdiction to order it to be raised."

Now, if that impression has been created in the minds of the committee, it is entirely erroneous. The Interstate Commerce Commission went to the law, and to the explicit statements in the law, to find its jurisdiction. And the provisions were those which authorized it to remove discriminations against interstate commerce, and undue preferences, advantages, and prejudices as between persons and localities. It is a fact that, without justifying conditions, there is a lower level of rates in the State than the interstate level, without any conditions justifying a differentiation between the State and interstate rate, I think that that is of itself, a discrimination against interstate commerce. But the Interstate Commerce Commission did not go to that extent, and did not need to go to that extent, as I say, but founded its decision on the precise provisions incorporated in the act.

Now, at the time I concluded on Wednesday, I was discussing the Nebraska freight-rate situation——

Senator FERNALD (interposing). As Senator Poindexter has just come in, Judge Scandrett, I think it might be well for you to go over that matter again which was raised by Senator Poindexter's question or remark.

Mr. SCANDRETT. Yes. I had read, Senator, your statement as to the basis of the claim made by the State commissions of the jurisdiction assumed by the Interstate Commerce Commission, which was that it assumed jurisdiction to raise those State rates, on the sole ground that a lower level of rates within the State operated as a discrimination against the railroads, an agency of interstate commerce, and I said that if that impression had been created it was an entirely erroneous one, because the Interstate Commerce Commission had confined itself squarely within the four corners of the law and had expressed its jurisdiction because it found that under substantially similar circumstances and conditions there was this lower level of rates, and that it resulted in undue preferences, advantages, and prejudices as between persons and localities and an undue discrimination as to interstate commerce.

I said further, speaking only my own personal view, that I think that if there is a lower level of State rates than interstate rates—a lower level of State freight rates or passenger rates—without justifying conditions to differentiate it from the interstate adjustment, that that is in and of itself a discrimination against interstate commerce, but the Interstate Commerce Commission did not have to and did not go that far in these decisions.

As I said, when I concluded on Wednesday, I was discussing the Nebraska freight rate case and in the interest of conserving time I am not going to go into that further than to say that there was evidence before the Interstate Commerce Commission as to every commodity that moves in volume, State and interstate, as to all of the classes, and that there was affirmative evidence showing the lower level of rates, and the affirmative finding by the Interstate Commerce Commission that there were no conditions which warranted or justified that lower level, and that the showing was such that under any interpretation of the Shreveport decision the facts were brought squarely within the rule of that decision.

Mr. THOM. And also specific evidence of discrimination in that case.

Mr. SCANDRETT. Yes. Now, I think it is also interesting to note that when we had this proceeding involving the question of the Nebraska rates before the Interstate Commerce Commission it was set for hearing at Lincoln, Nebr., where the interested parties resided. The Interstate Commerce Commission in all these cases set the hearings in the particular localities that were interested. And though this hearing was held at Lincoln there was but one shipper who appeared in opposition to the petition of the carriers, which was that the Interstate Commerce Commission should prescribe the same rate on the State traffic as that prescribed on interstate traffic, and that was a gentleman who represented the sand and gravel interests; and I should say in that connection that subsequent to the hearing the sand and gravel rates, State and interstate, were worked out, through the cooperation of the State commission of Nebraska with the Interstate Commerce Commission, and so far as I know they are entirely satisfactory at this time. Now, while there was that one appearance in opposition to the carriers' petition, there were many appearances in support of the petition. The cities of Sioux City, Iowa, Council Bluffs, Iowa, Kansas City, and Omaha. The Grain Exchange of Omaha, Nebr., also appeared because of this difficulty in the grain rates to which I referred on Wednesday.

The Omaha Grain Exchange, in order to protect itself, had to advise the carriers that every shipment consigned to Omaha from points in Nebraska was intended ultimately to be shipped beyond, and therefore they asked the car-

riers to apply a higher rate than would have been applicable if the final destination had been Omaha.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION WERE WITHIN THE RULE OF DECISION IN THE SHREVEPORT CASE.

I want to refer somewhat briefly to the application of the rule in the Shreveport case to these various State cases. I will not undertake to enumerate all the respects in which the transportation act manifested an intent to confer additional powers, and did confer very broad additional powers, on the Interstate Commerce Commission. You are all familiar with those changes that were made; and when we get our second breath I am entirely confident that it will be found that these predictions of disaster that have been made on behalf of the State commissions will be found to be groundless and that this transportation act will work. It has not yet had anything like a fair trial.

I do not go into those changes because I am undertaking to meet the contention of the State commissions that the Interstate Commerce Commission exceeded its authority, and I meet it by undertaking to show that what they did they could have done under the old law; and certainly if they could have done it under the old law they could have done it under the new law.

While the decision of the Supreme Court in the Shreveport case was clearly foreshadowed in the decision of the Supreme Court in the Minnesota rate case, it was so sweeping in its prohibitions against anything which interfered with the free flow of interstate commerce that I think that its full import and the full extent to which it goes has not even yet been correctly apprehended in certain quarters. There has been a great deal of discussion about this statement of law and that statement of law in the decision, and I think we sometimes overlook the very simple state of facts which was before the court in that case.

Now, what were the facts in the Shreveport case and what was the order of the commission which was affirmed or approved by the Supreme Court? We had Shreveport, in the State of Louisiana—and I am reducing this to its lowest terms—and Dallas, in the State of Texas. The commission found that the rates from Shreveport toward Dallas were very materially higher than the rates from Dallas toward Shreveport, and that the traffic from Shreveport toward Dallas was interstate, and that the traffic from Dallas toward Shreveport to a point midway was State, and that the tariffs prescribed on this traffic from Dallas toward Shreveport were those fixed by the Railroad Commission of the State of Texas. It further found that the traffic from Shreveport and Dallas was handled under substantially similar circumstances and conditions.

I want to quote just one sentence from the decision of the Interstate Commerce Commission. It said:

"The orders of a State commission enforcing a discrimination against interstate commerce are not acceptable under the law."

The Interstate Commerce Commission ordered the removal of that discrimination, and, as I have said, the Supreme Court affirmed its order.

In these recent cases, the evidence brings the facts squarely within the four corners of that decision.

Let us look at it this way for a moment: Let us assume that at the time Shreveport brought this proceeding, there were proceedings brought by the border cities all around the State of Texas; and let us assume further that the showing that was made by Shreveport was made by each one of those border cities. Now, it is perfectly apparent that the order of the Interstate Commerce Commission entered in the Shreveport case would have been the order entered in each one of these other cases, and at that time, though in different proceedings, another adjustment of rates, State and interstate rates, would have been prescribed by the Interstate Commerce Commission.

Now, by reason of the change that you made in the transportation act, the carriers were permitted to institute those proceedings, and as a result of that, the Interstate Commerce Commission instead of being required to make a piecemeal readjustment through the bringing of successive cases, was authorized to, and did, review the entire adjustment. But when they had that entire adjustment before them, they viewed it just exactly as they did the Shreveport case, and only to the extent to which they found those discriminations and those preferences, prejudices, and advantages, did they order their removal.

Senator POINDEXTER. That is, as I understand the situation, a flat conflict of a statement of fact between you and the representatives of the State commissions. They deny that there was any investigation whatever made as to discrimination against interstate shippers; they say that a sweeping order is made, based solely on the fact of a difference in the rate.

Mr. SCANDRETT. Senator Poindexter, I say that that is unqualifiedly wrong so far as the cases with which I am personally familiar are concerned. And I say, that unless the Interstate Commerce Commission deliberately misstated the facts in its report in these cases, it can not be true in any case, because the findings were made by the Interstate Commerce Commission in each of those cases, and in each of those cases they pointed out typical illustrations of those discriminations, and of those preferences and advantages. And so that contention which you say is advanced by these gentlemen can only be true if the Interstate Commerce Commission deliberately falsified its records.

Senator FERNALD. Mr. Scandrett, the Senate is in session, and we will have to adjourn the hearing for a little time until we go to the Senate to make a quorum.

(And thereupon the proceedings and hearing were suspended, until the members of the committee returned from the Senate.)

HEARING RESUMED.

Senator FERNALD (presiding). You may proceed, Judge Scandrett.

Mr. SCANDRETT. There is a good deal more that I could say on this particular question that I was discussing—the application of the Shreveport doctrine. But the former chairman of the Interstate Commerce Commission, Chairman Clark, is to follow me on the stand, and he is so much more famliar with exactly what the commisison did, and its reasons for doing it, that I am going to leave it at this point.

Mr. THOM. Before leaving that, you might state that that case was not brought by the citizens of Shreveport, but by State authority.

Mr. SCANDRETT. Yes; I had intended to direct attention to that later, but I might as well do it now. This Shreveport case was not a case which was instituted on their own motion by citizens of Shreveport, but it was instituted by the Railroad Commission of Louisiana, at the direction of the legislature of that State, which, in its resolution, said that it desired, if possible, to find some way of relieving these discriminations against Louisiana which were brought about by the action of the Railroad Commission of the State of Texas.

"UNDUE BURDEN" VS. "DISCRIMINATION."

I want now to discuss for a few moments the question of the undue burden—if I may put it this way—versus unjust discrimination.

It has been repeatedly asserted in these hearings that the elimination of the phrase "undue burden on interstate commerce" by the conference committee which had in charge the transportation act restricted the power of the Interstate Commerce Commission over State rates.

I think a brief history of the legislative record is sufficient to answer that assertion. I can not speak, as some others have spoken or purported to speak, as if they knew what was in the legislative mind, but I have examined the records, and in the case of an unambiguous statute—and that is what I consider this is—we must assume that the legislative body intended that the law should be construed the way it was written.

The railroad bill which passed the House and that which passed the Senate differed in a number of respects, and, of course, the purpose of the conference committee was to reach an agreement. In some instances the conference committee adopted the phraseology of the House bill and in some instances it adopted the phraseology of the Senate bill and in still other instances it adopted neither. The bill as it passed the House contained, as an amendment to section 13, a provision condemning as unlawful and authorizing the Interstate Commerce Commission to remove any undue burden on interstate or foreign commerce, but it contained no reference whatever to an unjust discrimination against such commerce. On the other hand, the Senate bill contained an amendment to the same section authorizing the Interstate Commerce Commission to remove "unjust discrimination against interstate commerce," but contained no reference to an "undue burden on interstate

commerce." In this instance the conference committee adopted the language of the Senate bill and rejected the language of the House bill. That is the history.

It remains to consider what the effect was of that action. Possibly there may be difference of opinion, but to my mind there isn't any basis for a difference of opinion, because, in my opinion, it is clear that the language of the Senate bill, which became the law, was stronger than the language of the House bill. "Discrimination" is a broader term than "burden," and the term "unjust discrimination" is a broader term than "undue burden." Any burden on interstate commerce is a discrimination against that commerce, but all discriminations are not burdens.

Webster's dictionary defines "burden" as that which is borne with labor or difficulty, while "discrimination" is defined as a difference or distinction in treatment. A "burden," I say, is a narrower term than "discrimination," and, in fact, "discrimination" comprehends all that is included within the meaning of the word "burden."

And so I say that instead of the conference committee weakening the language which was in the House bill, it, by adopting the language of the Senate bill, strengthened that language and conferred broader powers on the Interstate Commerce Commission than it would have had if the House bill had been passed.

I had in mind to advert briefly to some of the charges which Mr. Benton has made as to bad faith of the carriers in instituting these proceedings before the State commissions, and as to the action of the Interstate Commerce Commission in taking jurisdiction, but I do not believe it is worth while to go into those questions, and so I pass now to a consideration of the amendments which are before the committee.

ANALYSIS OF THE CAPPER BILL.

We have the Capper bill (Senate bill 1150) and the Nicholson bill (Senate bill 2510), and we have the amendments proposed by Mr. Benton on behalf of the National Association of Railroad and Utilities Commissioners.

I want to say at the outset that each one of these bills, or proposals, is a very sweeping measure and involves a complete reversal of not only the transportation act but of the act to regulate commerce as it was before the passage of the transportation act.

Speaking now to the question of discrimination in State rates, while different routes are followed, each one of these measures arrive at the same goal, the goal being to deprive the Interstate Commerce Commission of any control whatever over discriminatory State rates, and in making that statement I measure my words. That is the necessary effect of each and every one of these proposals.

Senator POINDEXTER. Is it your opinion that they would modify the doctrine laid down in the Shreveport case?

Mr. SCANDRETT. Absolutely; they would absolutely nullify it, Senator, and I think that is demonstrable from an analysis of the bills which I now propose to make.

I will take up first the Capper bill. That bill proposes to amend sections 3 and 15 of the interstate commerce act and to repeal paragraphs (3) and (4) of section 13, and section 15a of the same act.

Section 3, as the committee well knows, is what is known as the discrimination section, and is the section under which the Shreveport case was decided. The amendment proposed to that section is to add a proviso to paragraph (1), as follows:

"That the provisions of this paragraph shall not be construed to prohibit any State, through its proper regulatory bodies, from exercising full and complete jurisdiction for the regulation of intrastate traffic, which jurisdiction is hereby expressly reserved to the States."

Now, I say that the purpose of that proviso to take from the Interstate Commerce Commission the authority which the Supreme Court found it had under the original act to regulate commerce is entirely plain and requires no comment, but to make it doubly plain that that is the purpose the following amendment is proposed to section 15, which is the section which confers upon the Interstate Commerce Commission the authority to prescribe rates. [Reading:]

"That the provisions of this paragraph shall not be construed to apply to any individual or joint rate, fare, or charge, or rates, fares, or charges on

shipments moving wholly within one State, and that the jurisdiction to regulate all such intrastate rates, fares, and charges is hereby expressly reserved to the several States."

Senator POINDEXTER. What are you reading from now, Mr. Scandrett?

Mr. SCANDRETT. That is the Capper bill.

Now, then, I come to the amendments which the Capper bill proposes to section 13, and the paragraphs which are proposed to be amended, are those which were added by the transportation act, and which provide for the notification of the State authorities in case rates imposed by State authority are brought in issue in any investigation under the provisions of the act to regulate commerce, or in any investigation instituted upon petition of the carrier. They further authorize conferences and cooperation between the Interstate Commerce Commission and the State commissions, and also authorize the Interstate Commerce Commission, when it finds that State rates cause undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, to prescribe such rate as will remove the advantage, preference, or discrimination. The repeal of those two paragraphs of section 13 is in line with the proposed amendments to sections 3 and 15 above mentioned, the purpose being to deprive the Interstate Commerce Commission of all jurisdiction over discriminatory State rates.

Senator POINDEXTER. What are the interests back of the Capper bill? Do you know who is proposing that bill?

Mr. SCANDRETT. I do not, Senator. There is a great similarity between all these bills; that is, between the several amendments that are proposed. I think the amendments suggested by Mr. Benton go beyond even the Nicholson bill, although in some instances the amendments suggested by Mr. Benton and the Nicholson bill are in identically the same language.

I said that the Capper bill proposes to amend those sections. It does not. It proposes to repeal them so that there is nothing left there at all.

It also proposes to repeal section 15a of the act, which is the rate-making section, and the section which provides for the recapture of the so-called excess earnings, and the creation and administration of the general railroad contingent fund.

As I say, Senator, in answer to your question, I do not know what interests are back of it, but I assume the reasons for seeking a repeal of that section are those given by Mr. Benton in his statement, and which I have already endeavored to meet, and which Mr. Fisher yesterday, in my judgment, met very fully and very ably, and I will not go into it.

In furtherance of the plan to deprive the Interstate Commerce Commission of all jurisdiction over State rates, the proposed bill provides, in sections 5 and 6, as follows:

"SEC. 5. It is hereby declared to be the policy of Congress to permit the properly constituted State regulatory bodies to exercise full and complete jurisdiction over intrastate commerce, and that no provisions of the act to regulate commerce or of the transportation act, 1920, shall be construed to confer upon the Interstate Commerce Commission any power or authority to in any manner regulate intrastate commerce or the facilities used in connection with the transaction of such intrastate commerce."

Now, that is a declaration for the future. Here in section 6, which I now read, the author gives attention to the past.

"SEC. 6. That no order of the Interstate Commerce Commission heretofore or hereafter made requiring or purporting to require any carrier to establish, put in force, or maintain any rate, fare, charge, or classification applicable to the transportation of passengers or property between points wholly within one State, shall be of any force or effect whatsoever so far as respects such transportation."

Under that, as I view it, ipso facto, every order heretofore entered by the Interstate Commerce Commission and now in effect would be stricken off, and therefore to the extent that the present rates prescribed by the Interstate Commerce Commission superseded rates prescribed by State authority they would become unlawful. It is unnecessary for me, I think, to dwell upon that or to do more than merely mention the absolute chaos that would result from the enactment of that section of that bill.

Mr. THOM. Would it not also follow that all the old Shreveport orders would be stricken out?

Mr. SCANDRETT. Yes; that is what I say. Every order, whether it antedated the transportation act or not, would be stricken off.

Mr. THOM. May I ask you this: It also provides that the facilities of intrastate commerce shall be under the charge of the State commissions. Are they not, in fact, the same as the interstate facilities?

Mr. SCANDRETT. Absolutely.

Senator FERNALD. That would permit, Judge Scandrett, 48 different boards to make 48 different rates and regulations if they saw fit to do so.

Mr. SCANDRETT. Yes; absolutely, and it would allow 48,000 discriminations.

ANALYSIS OF THE NICHOLSON BILL.

I will take up next the Nicholson bill. It proposes to amend paragraph (4) of section 13 by the addition of certain language to that section. It is very similar to the amendment proposed by Mr. Benton. Mr. Benton's proposal incorporates everything, I think, that is in the Nicholson bill, and then a great deal more besides.

The Nicholson bill would restrict the power of the Interstate Commerce Commission to set aside rates imposed by State authority, except where there was competent evidence that they injured persons or localities engaged in interstate commerce "to such an extent as seriously to diminish the business of such person or persons or seriously to retard the growth and development of such locality or localities"; and were also found from competent evidence "to be unreasonable and noncompensatory under conditions existing in such State as to construction, maintenance, and operation of such carriers and under honest, efficient, and economical management."

A further proviso is added requiring the Interstate Commerce Commission to make a report of facts from the evidence in the record on which it bases its findings, and still another provides that orders heretofore made prescribing intrastate rates, etc., shall be of no effect after the expiration of 90 days from the passage of the act, "but the Commission, within such period, upon consideration of the record in any proceeding wherein any such order has been made, and without further hearing may, within the limits of the power granted by said section 13 as amended by this act make a new report and such new order as may be justified by the facts found therein and supported by said record."

It is entirely clear that the enactment of this law would very greatly curtail the powers of the Interstate Commerce Commission as defined by the Supreme Court in the Shreveport case, and I say in practical effect it would nullify that decision.

It will be noted that before the Interstate Commerce Commission could act it would be required, first, to find discrimination, and, second, to find that the State rate was unreasonable and noncompensatory.

It would change the present section in three important respects:

First. By requiring more evidence to justify a finding of discrimination;

Second. By removing from the category of discriminations which require action on the part of the Interstate Commerce Commission, discriminations against interstate commerce; and

Third. By requiring proof that the State rate was unreasonable and noncompensatory.

While the first two would be backward steps and should not, I think, be contemplated for the reasons heretofore discussed, there would still remain some field within which the Interstate Commerce Commission could operate, or, rather, for the operation of the power which the bill purports to leave with the Interstate Commerce Commission, were it not for the requirements of the provision that there must be a finding that the State rate is unreasonable and noncompensatory. I take it that the proponents of these measures mean by that language "noncompensatory," confiscatory. In other words, if this bill were enacted—and the Benton proposal is almost identical with this particular feature—no matter how discriminatory the adjustment, no matter how severely the interstate shipper was penalized by these State rates, there could be no relief unless there was a showing that the State rate was confiscatory. This, it seems to me, would be a most unfair burden to impose upon a shipper as a condition upon which he may have that to which he is entitled in common justice—a nondiscriminatory rate adjustment.

In point of fact, I do not think any shipper, as a practical matter, could carry this burden. No one who has ever participated in a confiscation case can min-

imize the extreme difficulty of making the proof. Now that, if you had an entire body of State rates, which would be the easiest kind of a case, involves allocation of property, revenues, and expenses, as between State and interstate and as between freight and passenger—in itself an almost impossible task. If, as would be frequently the case, however, you had a rate involving only a few commodities and you were under the necessity of proving that the rates on those commodities were confiscatory, that burden would be very much greater. And if it involved only a rate between a few points, the burden would be even greater. In other words, the narrower you make the issue as between commodities or localities, the more difficult the proof.

Senator POINDEXTER. How do you undertake to prove it in certain cases?

Mr. SCANDRETT. Senator, that is such a long story——

Senator POINDEXTER (interposing). Do not go into it, then, if it is a long story. I thought you had some general principles that you might solve it by.

Mr. THOM. Isn't it absolutely an impossibility to prove confiscation by a single rate?

Mr. SCANDRETT. I think so. I certainly would not want to undertake it.

Senator POINDEXTER. I had some curiosity to know how it would be done.

Mr. JOHNSTON. As a matter of fact, has not the Supreme Court held that some particular service on some particular thing, as was singled out in the North Dakota Coal case, a particular service may be noncompensatory without being invalid, and as in the Atlantic Coast Line case, and that even then, if you showed that that particular rate might be noncompensatory, without lugging in the whole State fabric to show that it was confiscatory, you would get nowhere, even though you showed it in that particular instance?

Mr. SCANDRETT. I think so. Of course, that Atlantic Coast Line case was one where they were performing a service, and there is that difference between that case and the North Dakota Lignite Coal case.

But I think we ought to bear in mind, however, the distinction between a rate which is just sufficient to escape the charge of confiscation, and one which is fully reasonable. There are certain commodities which can bear a rate which will afford the carrier a generous measure of profit; there are other commodities which, if they are to be moved, the carrier must handle them on a very narrow margin, and unless the rates are so made the movement of those commodities is prevented.

The class rates to which Senator Cummins referred the other day, and the principle of classification itself, are an illustration of this. Take, for instance, first class, which comprises high-grade commodities, that can bear a rate which will yield a generous margin of profit without interfering with the man who ships, while on some of the lower classes the rates have to be figured very closely. But while the first class rate yielding a considerable margin of profit is relatively unimportant in so far as it affects the total movement, it does not mean that the relationship between the first class rates is not of importance in determining the shipper or locality which will supply a certain market. And if you make cost the test of reasonableness, you abolish the principles of classification, and if you require the same measure of profit on each commodity the result is that you practically stop commerce in some commodities. That is not a practical way to handle a practical question.

Now, while it is true that on a first class article, for instance, whether the rate is 50 cents or 75 cents per 100 pounds, may not affect the total volume of movement of that commod ty, yet that does not mean that a difference such as I have mentioned may not determine as between competing shippers, which one will handle a particular business. In other words, that difference may be sufficient to shut one man out of the market entirely and, of course, when he is shut out of the market the purchaser also is deprived of the benefit of his competition.

If that is done—if that difference is made in that first class rate, and there s no justification for that difference, there is clearly an unjust discrimination and preference and advantage, and it does not make any difference whether it is between two State rates, two interstate rates, or between a State rate and an interstate rate. In the latter case, or the latter event, if the State rate is lower it results also, as I pointed out, in a discrimination against interstate commerce.

Let us take under this bill such a case. We have a rate of 75 cents on interstate traffic and a rate of 50 cents on State traffic. There are no conditions that warrant that difference. The Interstate Commerce Commission's jurisdiction is invoked. Under this bill, they can not disturb that State rate unless

it is noncompensatory, and I have pointed out the difficulty in making that proof. On the other hand, they can not disturb the interstate rate unless they find that it is unreasonable and so, in that case, if this bill became the law, there would not be any relief whatever for this interstate shipper who, by reason of that improper adjustment of rates, was deprived of his market; there would be no way whatever in which he could get relief.

Mr. THOM. Mr. Scandrett, in depriving that interstate shipper of that market, it is true, is it not, generally speaking, that about 85 per cent of the commerce of the country would be thus put to a disadvantage?

Mr. SCANDRETT. That is the statement Mr. Wood made. I think that is substantially correct, as to freight.

Now, I want at this point, to correct an impression which has perhaps been created in the minds of some of the members of the committee that the Interstate Commerce Commission, in these discrimination cases, both those decided before the transportation act was passed, and since, has considered nothing but the fact of discrimination, and has ignored the question of reasonableness. For instance, in answering a question of Senator Cummins, as to whether under the amendment that is proposed there would be no remedy if notwithstanding the Interstate Commerce Commission found the State rate was discriminatory it also found that the carriers could do business under it and make a fair return on the value of their property, Mr. Benton said:

"There is remedy enough, Senator. There is remedy in correcting the wrong interstate rate. The trouble with the present situation is that the Interstate Commerce Commission proceeds upon the assumption that if there is a difference which causes what they see fit to call a discrimination, that the fault lies with the State rate."

Now, that statement is absolutely erroneous, and it is a statement that is very unfair to the Interstate Commerce Commission. There has been no case in which the Interstate Commerce Commission has ordered the correction of a discrimination created by State rates that it has not investigated and determined what would be a reasonable scale of rates for interstate application. In some cases it has found that the existing interstate rates were reasonable, and in those cases the carriers have been authorized to remove the discrimination by increasing the State rates to the level of the interstate rates; in other cases it has found that the interstate rates were unreasonable, and in those cases it has prescribed what would be a reasonable scale of interstate rates, and the carriers have then put those rates in effect and brought the State rates up to the same level. In the very first case—this historic Shreveport case—both situations were presented. In other words, the commission found, as to class rates, that the interstate rates from Shreveport into Texas were unreasonable, and they forced the carriers to reduce those rates. They prescribed what would be a reasonable rate. On the other hand, when they came to the commodity rates they found that the interstate rates were reasonable, and as to those they authorized the carriers to remove the discrimination by increasing the State rates. But in no case has the Interstate Commerce Commission ordered the removal of discrimination without a thorough investigation as to what would be a reasonable scale for interstate application.

I want to refer to this question of reasonableness. I have discussed this noncompensatory feature. Under this Nicholson bill, and under the bill as proposed by Mr. Benton, the commission would also have to find that the State rate was unreasonable. Rate making, of course, is not an exact science. In its last analysis the question of what is reasonable is a question of judgment, and, it being a question of judgment, two bodies equally informed, equally intelligent, and equally honest will reach, on precisely the same state of facts, different judgments as to what is reasonable. That being true, it is essential that there be some tribunal which has the right to decide the question of what is reasonable, and obviously, the only authority that can do that is the Interstate Commerce Commission. You can not leave it to the State commissions, otherwise you have one State commission prescribing one thing, and another another, and a third still another.

I would like now to read a quotation from the opinion of the Interstate Commerce Commission in the Missouri River-Nebraska cases, 40 I. C. C., 201, a case that was decided several years before the passage of the transportation act:

"The evidence offered by the Nebraska commission has been carefully examined and full weight has been accorded the results of its investigations

as expressed in general order No. 19. The record convinces us of the earnest endeavor of that commission to deal with the complex problem of rate making with justice to all parties before it. It is our conclusion, however, upon the facts here disclosed, that the intrastate rates prescribed in that order are too low for application as reasonable maximum interstate rates between the Missouri River cities and points in Nebraska, and therefore too low to form the measure by which the unjust discrimination found to exist should be removed. This conclusion is fully sustained by the many rate comparisons and other related evidence, some of which has been reviewed in the foregoing paragraphs, and by the material reductions in the defendants' revenues which would be consequent upon the application of the intrastate rates to interstate transportation."

The fact that the Nebraska commission acted on its best judgment did not make the discriminations against interstate shippers any easier to bear than would have been the case had its motives been of the worst. The effect of the adjustment was to deprive interstate shippers of markets which they could have served if the State and interstate rates had been properly adjusted. On the other hand, the Interstate Commerce Commission, in that case, could not shirk its duty, which was to prescribe for interstate carriage what, in its judgment were just and reasonable rates. It did so, but if it had stopped there, and had not paid any attention to these State rates, the discriminations would have continued. So the Interstate Commerce Commission fixed the yardstick for application to the interstate business and for application to the State business. As a result of that the State and the interstate shippers were put on a parity. and those discriminations were removed.

I leave this discussion with the statement that if the provisions of this bill, this Nicholson bill, or if Mr. Benton's proposals are adopted, we must recognize that the doctrine of the Shreveport case is expressly nullified. There is no use fooling ourselves that this purported authority to the Interstate Commerce Commission to remove these discriminations will be capable of exercise.

The other amendments in this Nicholson bill I will mention very briefly. It seems quite obvious that the purpose of requiring the commission to report the facts in evidence upon which its findings are based is for the purpose of laying the foundation for court review and litigation of the findings of the Interstate Commerce Commission.

As to the further proviso that all orders heretofore entered prescribing State rates shall be of no effect after the expiration of 90 days from the passage of the act, with the exception that the commission may within said period in the case of any such order, without further hearing, but "within the limits of the powers granted by said section 13, as amended by this act, make a new report and new order," it need only be said that in view of the limitations of the commission's power which we have been discussing, there is no case in which it could enter a new order requiring the removal of the discrimination. This is obvious when we recall that one of the limitations imposed is that the State rate must be shown to be noncompensatory, a question not considered and not litigated in those cases.

Therefore, while this would authorize the commission, as I say, to enter new orders on the old records, in view of the limitations, that could only be done when the report would justify the order, under the law. And, in view of the fact that in none of those cases has confiscation been shown—it was not an issue—there is no room for the assumption that the commission could enter new orders. And, therefore, just as under the Capper bill ipso facto, at the end of 90 days each one of these rates maintained by these carriers become unlawful and the rates that were superseded by the rates of the Interstate Commerce Commission are reinstated.

AMENDMENTS PROPOSED BY MR. BENTON.

Now, I come to Mr. Benton's proposals, which are to amend section 1 and paragraphs (3) and (4) of section 13 of the interstate commerce act, and to repeal section 15 (a) of that act, and the addition of a new section to the act.

The amendment to section 1 I will not read, as it is quite similar to section 5 of the Capper bill.

It is proposed to so amend paragraph (3) of section 13 that—

First. The authority now granted by that section to a carrier to file a petition bringing in issue State rates is withdrawn; and

Second. The provision in the present paragraph with reference to rates initiated by the President during the period of Federal control is eliminated; and

Third. It requires the Interstate Commerce Commission to confer, or afford opportunity for conference, with State commissioners before making any finding that a State rate, practice, etc., is within the inhibitions of the interstate commerce act. And this would be true, although the State commissions had already refused to act upon complaints of shippers pointing out the discriminations brought about by the State rates.

While Mr. Benton, in speaking of his proposed amendment of paragraph (3) of section 13, mentions the fact that it eliminates the provisions which authorizes the carrier to file a petition asking the commission to investigate a discriminatory rate adjustment, he advances no reason nor argument in support of such proposal. This provision was incorporated in the transportation act after full consideration, and certainly it should not be eliminated unless there is good reason therefor. I believe that not only is there no reason for its elimination but that, on the contrary, there are controlling reasons for its retention.

When we recall that the great underlying purpose of the interstate commerce act was to prevent the common carriers of this country from adopting or following discriminatory practices it is apparent that any provision which will aid in the accomplishment of that purpose should be incorporated in the law. It matters not to a shipper or a community that is injured by an unjust discrimination whether the discrimination arises from a State rate or an interstate rate. The thing which concerns him, or it, is the fact of discrimination, and not its source. Granting that unjust discriminations should be removed, and that the Interstate Commerce Commission should at least have some authority where the discrimination is caused by a rate imposed by State authority, it necessarily follows that there should be an adequate procedure to accomplish the result. No one is in a better position to know whether discriminations exist, and the extent thereof, than the carrier. Likewise, it is the carrier whose rates or practices cause the discrimination. The carrier, however, does not control its own rates; they are prescribed for it by State and Federal authority. It may, therefore, and frequently does, discriminate in its charges, and yet is powerless to correct such discrimination.

Furthermore, though it may know that there is discrimination, it is not its province to rule on the extent thereof. That is a right and duty imposed upon the Interstate Commerce Commission. Under these circumstances there is every reason why the carrier should be permitted to suggest the fact that discrimination exists to the Interstate Commerce Commission and invoke its jurisdiction to investigate the situation, so that if it finds discrimination in fact it may require its removal. It should not only be the privilege of the carrier, but its duty, to institute such proceedings and to assume its full share of the burden in developing the facts, instead of sitting idly by and leaving that burden of time and expense to be borne by its patrons. It is, I say, my conviction that there is every reason why the present provisions on this subject should be retained. It is certain that no reason of any kind or character for eliminating them has been suggested by the proponents of the bill, and I am entirely confident that no reason for such action can be advanced.

Mr. Benton also proposes to amend paragraph (4) of section 13 to conform with the theory of the amendments to paragraph (3) and then adds the following proviso:

"That no rate, fare, charge, classification, regulation, or practice applicable to the transportation of persons or property in intrastate commerce, made, imposed, or required to be kept in force by authority of any State, shall be set aside or held to be within the inhibition of any section of this act solely by reason of the fact that it yields to the carrier a different revenue from that received for corresponding mileage from the interstate rate with which it is compared, but only if the same shall be found, from competent evidence, to injure a person or persons or a locality or localities engaged in interstate commerce to such an extent as seriously to diminish the business of such person or persons or seriously to retard the growth and development of such locality or localities; and unless the same shall also be found from competent evidence to be unreasonable and noncompensatory in such State under honest, efficient, and economical management and operation: *Provided further*, That whenever the commission shall make any order prescribing any rate, fare, charge, classification, regulation, or practice for intrastate application it shall make a report of the facts found from the evidence in the record, upon which it bases the findings hereinbefore provided for: *And provided further*, That no order of

the commission, made under the authority of this paragraph, prescribing any rate, fare, charge, classification, regulation, or practice shall operate to prevent the exercise of any State of its regulatory power with respect thereto for a longer period than two years from the date when said order shall become effective."

This proviso is quite similar to the amendment proposed in the Nicholson bill and is subject to the same objections. I have discussed that proviso at some length in connection with the Nicholson bill, and everything that I said in that discussion is pertinent to this amendment proposed by Mr. Benton.

Mr. Benton incorporates in a separate section the identical language in the last proviso of the Nicholson bill amending section 13 in regard to setting aside orders of the Interstate Commerce Commission heretofore entered with the same provisions purporting to authorize the commission to enter new orders on records already made, but which, in fact, would in no sense permit the commission to do so for reasons already mentioned. I was struck, in reading Mr. Benton's testimony, by the following colloquy between him and Senator Kellogg:

"Senator KELLOGG. Then, your point is that the Congress should not exercise any power to protect interstate commerce against discrimination by State rates?

"Mr. BENTON. My personal judgment, which you appear now to be asking for, is that the Congress should just wipe the slate clean of the Shreveport power, and put into the act a provision similar to that which is included in the Sweet bill in the House which would keep the Congress informed all the time of any occasions where a State, in the opinion of the Interstate Commerce Commission, was misusing its power to make intrastate rates.

"Senator KELLOGG. But commit the absolute power to the States so that no interference could be corrected by the Federal authority?

"Mr. BENTON. That is my personal opinion."

The amendments which Mr. Benton proposes do not on their face go to the extent which Mr. Benton said in answer to Senator Kellogg it was his personal opinion they should go, yet when you analyze them the necessary effect is absolutely the same as if Mr. Benton had drafted this amendment so as to accomplish exactly what he said to Senator Kellogg it was his personal opinion should be accomplished. On its face it still leaves some authority to the Interstate Commerce Commission, but in practice it would leave none.

CONCLUSIONS.

In closing what I have to say, if the committee please, I want to state very briefly that it is entirely erroneous to place this controversy on the ground of a conflict between the State authority and the interstate authority—between State commerce and interstate commerce.

There have been three cases involving this power before the Supreme Court of the United States. In each of those cases the complaint was made in behalf of the State, or a subdivision of a State, or the citizens of a State, against the discriminatory action of another State. They were in a situation where the State itself could offer or afford no relief. As I pointed out earlier this morning, the Shreveport case was brought by the Railroad Commission of Louisiana at the direction of the legislature of that State. The next case that came before the Supreme Court was the South Dakota Express case, in which the citizens of Iowa appealed to the Interstate Commerce Commission because of discriminations created by the State of South Dakota. And the third case, the Illinois case, where the citizens of communities in Missouri and Iowa complained of discriminations imposed by the State of Illinois.

You repeal these provisions of the interstate commerce act under which these orders have been entered, and what is left? It seems to me the necessary result is going to be a guerrilla warfare between these different States in the matter of rates—wars of reprisals. If the State of Louisiana can not get correction of its wrongs from the Interstate Commerce Commission—wrongs imposed by the action of the State authorities in Texas—why, it is going to undertake to create adjustments in Louisiana which will do for Louisiana what Texas does for Texas. And so on it will be with each of the States. That will be an unsatisfactory situation. But beyond all, in all of these cases, the result is going to be that the man who ships in interstate commerce, the man who travels interstate, is always going to sustain the prejudice—is always going to have the discrimination imposed upon him.

Under the law as we have it now equal treatment must be accorded all of the patrons of these railroads. The arbitrary and imaginary State lines do not

impede the flow of commerce in any way whatever, and certainly that is a desirable situation, and certainly the prospect that is held out by these amendments that are proposed to the act is entirely undesirable. They represent backward steps, and they are steps which should not be contemplated under any conditions.

I want to thank the committee for its very great consideration in listening to me at this length. I appreciate it.

Senator FERNALD. We are very much obliged to you, Judge Scandrett, for your statement.

The CHAIRMAN. Very well.

Mr. THOM. Mr. Chairman, I wish at this point to put in the record this statement, that for a traveler taking a railroad journey interstate to break it so as to defeat the regulation by the Interstate Commerce Commission of that journey, is in reality a fraud on interstate commerce.

STATEMENT OF MR. S. DAVIES WARFIELD, PRESIDENT NATIONAL ASSOCIATION OF OWNERS OF RAILROAD SECURITIES, BALTIMORE, MD.

The CHAIRMAN. Mr. Warfield, you may state your name, your residence, and your relation to this subject.

Mr. WARFIELD. My name is S. Davies Warfield, of Baltimore, and I appear here as president of and on behalf of the National Association of Owners of Railroad Securities.

Mr. Chairman and gentlemen of the committee: The opposition that has been developed before this committee to the rate-making provisions of the transportation act can only be regarded as an effort to restore the destructive prewar basis and methods of rate making. For no constructive suggestions have been made to rectify a condition that before the war had reached the point where regulation by governmental agencies had broken down largely because of indefinite legislation, and when the lack of a sound and comprehensive transportation policy for the country, as a whole, compelled excessive costs in producing such service as was then furnished.

We believe that the transportation act is being assailed before this committee, not because it is unsound or unfair in theory or practice but because the principal witnesses opposing it here have consistently stood against what in fact it was intended to produce—a fair return on railroad property, in the aggregate, devoted to the public use, and no greater than is essential to produce adequate transportation conducted in the interest of all sections of the country and of all the people.

We believe that the difference between the methods prescribed by the transportation act and prewar methods is that under the old basis the same opposing forces now appearing here were encouraged to attack, and before the Interstate Commerce Commission they for years successfully attacked increases in individual rates even when the percentage yield on railroad property, in the aggregate, was shown to be less than was demanded by the actual necessities of rail transportation.

We believe that the repeal of section 422 of the act would mean that rates will be forced down to inadequate levels through the efforts of those, who, taking advantage of the period of reconstruction when prices have little relation to costs, and apparently with little regard for the investment in or the future of the railroads, seek to turn this hearing into a rate hearing, which properly should be before the Interstate Commerce Commission. For we assert that there is nothing in the transportation act that requires the commission to do other than produce from rates proportionately adjusted and distributed, a fair yield on railroad property, in the aggregate, used in the public service. found to be the minimum return below which transportation can not be adequately supplied, leaving the commission to fix the value of railroad property upon which is computed the return named in the act. There could be no wider discretion granted the commission as to how the return shall be produced than the act provides, if any assurance at all is intended to be given investors that the Government will stay the hand of regulation short of permanent injury to the value of railroad securities. Congress has only named in the act a measure to guide the commission until March 1, 1922, and to be reached "as nearly as may be"; after March 1, the responsibility of ascertaining and declaring, from time to time, what is a fair and reasonable return is placed entirely upon the commission.

EFFECT OF REPEALING MEASURE OF RETURN.

Is the repeal of the rate of return specified in the act, viz, 5½ per cent, intended to place this committee and Congress in the position of declaring that 5½ per cent is too great a return on railroad property in the aggregate, devoted to the public use? Or is the purpose to have such action by Congress to be taken by the commission to mean that Congress, having decided that this rate of return is excessive, has repealed it; and that after March 1, 1922, when the commission, under the act, is required to ascertain the rate of return, it should be less than 5½ per cent? Or is the proposed repeal intended to have both meanings? There can be no other purpose in this repeal. for the stated rate of return of 5½ per cent named in the act expires within the short period of approximately three months, during which period of reconstruction it is not expected that this return will be reached, and after March 1st the commission is to ascertain and declare the rate of return it considers to be fair. The railroads, voluntarily or through orders of the commission, have lowered and are still reducing rates in the interest of reconstruction, not in the interest of the railroads, and when less than half the return called for by the act is realized. Some idea of the very substantial reductions and readjustments of rates since August 26, 1920, can be obtained from the letter of Commissioner Lewis, of the Interstate Commerce Commission, to Congressman Sanders, of the House Committee on Interstate and Foreign Commerce, dated October 26, 1921, and printed as House Document No. 115, a copy of which is submitted herewith. Many of these reductions have only recently become practically available; so the shippers do not realize what substantial reductions are being made.

It is reliably estimated that on the volume of traffic handled last year the saving to shippers and the corresponding loss to the carriers will amount to approximately $214,000,000 per annum, which is approximately two-fifths of the total net railway operating income of all the Class I railroads for the year ended August 21, 1921. With an estimated increase of 5 per cent in the volume of business for 1922 the total railway operating income would be approximately $834,000,000 if these reductions had not been made; these reductions will, however, reduce this amount by $214,000,000, or approximately one-fourth of what would otherwise have been paid by the shippers and received by the carriers. The figures named would result in a return of 3.3 per cent on the commission's tentative valuation of the carriers, as a whole. Unless there are substantial reductions made in railway operating costs it is evident that sufficient net operating revenue would not be received to maintain transportation.

No interpretation can be put on the efforts being made here to force the repeal of section 422 other than the desire to produce the evident effect that such action would have upon the commission and upon the public. Should this committee abandon its declaration of what it considered to be a reasonable rate of return on railroad property, as interpreted by section 422 of the transportation act after months of searching investigation, rarely made by a committee of any legislative body, with all the requirements safeguarding the shippers which that section contains, such action would cause lack of confidence in railroad securities and defeat the purposes of the act, one of which was to enable the railroads to be permanently financed other than by the Government.

If the great investing institutions—the large sources of investments—are thus notified that Congress and the commission are not at least endeavoring to secure the stated reasonable return on public-service property, taken in the aggregate, then the opportunity of the carriers to secure money from permanent investing sources to supply this public service will be greatly limited, and it is a grave question whether it will not reach the extent of requiring Government railroad financing through taxation.

The railroads are completely regulated by the Government. They charge for transportation only what the Government permits and must pay in wages all that the Government requires. Those who invested their own money, or funds held in trust for millions of people, in regulated railroad securities on the faith of honest regulation, are told in the act only what is the minimum return essential to conduct transportation. To compare these Government controlled and regulated properties with uncontrolled, unregulated enterprise, as has been attempted before this committee, is, of course, grossly misleading.

If exception is taken, as has been, before the committee, to the tentative valuation of railroad property devoted to the public use made by the Interstate Commerce Commission on the ground that it is too high, then the proper tribunal to approach is the commission. If there is complaint that rates should be adjusted or readjusted, then the same agency should be appealed to. Congress properly delegated such powers to the commission.

The CHAIRMAN. I think, Mr. Warfield, that you have overlooked one of the claims, and possibly the principal claim, made by those who have appeared before us. It is not the effect of the basis of 5½ per cent adopted by Congress? The complaint, when it is analyzed, practically is that we ought not to authorize the commission to either take the railroads as a whole or groups of railroads into which they may be divided, and say to the commission that it should fix the rates that would make a fair return upon the aggregate value of the property either as a whole or in those groups. It is asserted, very earnestly apparently, that we ought not to deal with the subject in that way at all, that we ought to leave the commission with its authority to fix a reasonable rate in any given case upon any given railroad. That is the real contention before the committee.

Mr. WARFIELD. Can that be practically worked out?

The CHAIRMAN. Well, just as it worked out before.

Mr. WARFIELD. Well, but the commission always applied their rates to three groups of carriers at the time——

The CHAIRMAN. No; at the beginning of 1910, not before.

Mr. WARFIELD. No; but for a number of years they have been doing that.

The CHAIRMAN. But I want you or some of you to pay attention to that proposition, because that is the fundamental proposition. It is not the 5½ per cent. While that is a bogey that is used by unthinking people to attack this legislation, yet when you come down to the real thing, the claim is that we ought to return to the law as it was and not treat the railroads either as a whole or in groups.

Mr. WARFIELD. That is an utterly impossible suggestion.

The CHAIRMAN. Well, that is the claim whether it is impossible or not.

Mr. WARFIELD. Well, what do you propose? Simply to go back to the old-fashioned plan of rate making and under which individual roads were considered without any respect to what would be the effect of that upon transportation as a whole?

The CHAIRMAN. Oh, no. No one, I think, disputes you that the return to a given railroad must be taken into account in determining what the rate shall be upon that railroad. But it is disputed that we have either constitutional authority or that it will be wise to exercise it if we had, to take the railroads as a whole or in groups and fix the rates that will make a fixed return upon the value of the property in those groups or as a whole. Perhaps I do not make myself clear.

Mr. WARFIELD. Yes; perfectly so.

The CHAIRMAN. But that is the real question before the committee.

Mr. WARFIELD. I still go back, Senator, to the time, in 1910, when the commission, which is the rate-making power, divided the country into three rate districts. Now, in making the rates they did have some regard to the return those rates made on the aggregate value of the property in those districts, and in that way you got a comparison. That was compared year after year in the annual reports of the commission. These gentlemen do not find fault with that, as I understand it.

The CHAIRMAN. They find fault with it when it is put into a statute.

Mr. WARFIELD. The only difference, Senator, from the old plan is adding one more district and in stating the return. But it seems to me there must be some way, somehow, to get a return on the value of the aggregate property of the railroads. There must be some way to compare. They give you no way to compare. The commission had adopted that plan of comparison at least, and we thought that was a good reason why it should be continued, leaving the commission to make as many rate territories as they saw fit.

The CHAIRMAN. Well, I simply wanted to call your attention to the fact that while the 5½ per cent basis is strongly objected to, it is used somewhat, I think, as an illustration and does not form the real objection to this legislation as viewed by those who have appeared before us. They insist that what is a reasonable rate on a given railroad can not be ascertained by taking the railroads as a whole and considering them either as a whole or in groups.

Mr. WARFIELD. Senator, that will be taken up in detail by another witness.

PRESENT RETURN COMPARED WITH FEDERAL-CONTROL RENTAL.

The repeal of section 422 of the act is being pressed before this committe, when at no period has the percentage return on railroad property in the aggregate provided in the act been obtained, and when as many as 5,000 rate reductions, including some 50 principal commodities, have been made either voluntarily by the carriers or ordered by the commission, still further curtailing the return of 5½ per cent to the railroads, as named in the act. The average return on the tentative value as ascertained by the commission of the property of all class I railroads for the 12 months ending August 31, 1920, was 0.015 per cent; for the same period 1921 it was 2.85 per cent; but maintenance expenditures for the 12 months ending August 31, 1921, were $2,241,293.421. This was $225,884.959 or 9.16 per cent less than for the same period of 1920, and equivalent to 1.22 per cent on the valuation of the railroads as a whole, thus reducing the return thereon to 1.63 per cent.

The rental or compensation that was to be paid all class I railroads under the Federal control act, which was based on the average of the years 1915, 1916, and 1917—the test period selected by Congress—was $906,524,000. Reduced to a percentage basis, this rental equaled 5.18 per cent on the total value—adjusted to the basis of the commission's tentative valuation—as of December 31, 1920, of all railroad property of class I railroads devoted to the public use. The return for the 12 months ending August 31, 1921, of 2.85 per cent is, therefore, 2.33 per cent less than the standard rental fixed by Congress to be paid the railroads during Federal control.

If the maintenance deficit for the period named in 1921 over the same period of 1920, viz, 1.22 per cent on the valuation, is deducted there is left 1.63 per cent, or about one-third of what was allowed the railroads as compensation for the use of their properties during the war. On this showing of results the committee is asked to strike from the transportation act of 1920 section 422 and to radically amend section 416, without any consideration given the fact that the railroads are contributing their part in aiding reconstruction in not receiving the return named.

Mr. Chairman, we feel that the time has come when we must all face the seriousness of the outcome of action taken by this committee and the Congress that may involve the abandonment of the private operation of rail transportation. We can not blind ourselves to the fact that there is being evidenced the old feeling toward the railroads that existed before the war and the desire to return to the old order of rate making. We will not question the contention that is made that the railroads can not be relieved from all responsibility for this attitude, but there are certain fundamental principles that underlie the continuance of private operation of the railroads. It may be well to state them.

CONSEQUENCES OF CHANGES PROPOSED.

These principles and the inevitable consequences of what is proposed before this committee, if the purposes of those supporting the proposed amendments to the act are attained, may be briefly summarized as follows:

(*a*) If Congress adopts the suggestion that regulated railroad freight rates shall go down as the unregulated prices of commodities go down, unaccompanied by the requirement that freight rates shall go up as the prices of commodities go up—impracticable of accomplishment—such a policy can only be adopted, if at all, by frankly adopting at the same time the policy of supplying the deficit by taxation. Would not the operation of the railroads under such a policy become a governmental function and inevitable losses be supported by taxing all the people? No such result can be attained under private investment in railroad securities and under private operation.

(*b*) If Congress shall decide that the bare requirements essential to the transportation of an article of commerce by rail are not to be regarded as a necessary part of its cost delivered at its destination or where sold, then the Government should sustain the loss incident to such a policy.

(*c*) If the farmer or the owner of a private business, unregulated and free to pursue any policy in management, distribution or competition, whether sound or unsound, can secure the declaration by Congress in effect that his products, over which Congress has no control either as to production or price, shall be carried by a railroad, privately owned and regulated by the Government in its every sphere of activity, for less than will produce the reasonable return now contemplated by the act, such a declaration can only be considered as a notice

that railroad properties can no longer be expected to be supported through the investment of funds held in trust or by private investors.

(*d*) If the conclusion is reached that the products of any particular section of the country or of any industry should be transported without such products bearing their just proportion of the revenue essential to operate the transportation system as a whole, it would appear that the time has come when he loss incident to such a policy should be met by taxation. The considerations underlying such a policy would be political in character and should be supported by political authority which would be responsible for results and for the waste incident thereto or impaired service that might result.

(*e*) If the pressure upon this committee by those opposing the transportation act should result in the destruction of the machinery provided in the act for the coordination of the work of State commissions with that of the Interstate Commerce Commission, no policy can be adopted by the latter under which any measure of return on the aggregate value of railroad property could properly be provided for, whether named in the act or left to be named by the commission. When the Government has provided regulatory agencies to regulate rates and wages not to provide at the same time for the adjustment of intrastate rates that burden the interstate structure would produce conditions difficult to meet through means other than by taxation.

We expect to submit to this committee at this hearing supporting data and evidence which will confirm this summary.

ACTION BY TRUSTEES OF INVESTING INSTITUTIONS.

The conditions that would surround the readjustment of the world after so disastrous a war were at least partly foreseen and were indicated in the testimony of the representatives of the National Association of Owners of Railroad Securities at hearings before this committee in January and February, 1919, and suggestions were made to help meet them. For years those who managed the affairs of great mutual investing institutions—the principal source for the absorption of large amounts of railroad securities—observed that rates, upon which alone the interest and value of these securities depended, were gradually being forced down to a point where the return on the aggregate value of railroad property as a whole was not sufficient to sustain the transportation system and the securities issued by the railroads composing it. The point had been reached where it was manifestly the duty of these trustees, charged with the investment of trust funds, to determine on a line of action which would promise protection to millions of holders of life insurance policies and depositors in mutual institutions they represented. No better evidence of the necessity for a change in the method of rate procedure could be produced than the Fifteen Per Cent Rate Increase case before the Interstate Commrece Commission in June, 1917.

Representatives of these investing institutions appeared before the commission at that time and asked that a policy be defined through the adjustment of rates to enable these institutions to know whether the railroads could expect sufficient revenue from rates to maintain transportation and pay their debts. Just prior to this hearing the association of security owners was organized to give collective effect to what was considered to be essential to railroad credit if investment in railroad securities was to be protected. Relief was not forthcoming from the commission, largely because of lack of legislation to enable the commission to properly function.

So, when Congress took up the questions involved in the return and regulation of the railroads incident to ending Federal control, this association asked to be heard.

There is no concealment of the fact that before the Fifteen Per Cent Rate Increase case and before the organization of this association the time had arrived when, in the opinion of able counsel and others, the return on railroad property, in the aggregate, had reached the point where confiscation was threatened if it had not already been reached, and the question was to be determined whether there should not be a concerted movement to refer these conditions to the courts. Trustees of large mutual investing institutions were greatly concerned and felt that it was incumbent upon them to take action in the premises.

This action, however, was thought to be the last resort because of the endless controversy and general demoralization of credit and of transportation which would ensue under such procedure. We came before this committee.

backed by perhaps the largest and most representative investors ever collected together, and presented a memorial or petition to this committee and to the House committee, the signers of which represented approximately 85 per cent of the funds available for railroad investment; numerous trade bodies, chambers of commerce, large shippers, and others were signers. The representations then made are in the records of this committee, and what the association stands for was amplified at the hearing of June last.

The security owners represented are very largely bondholders, which form of investment bears the proportion of about three to two of the existing railroad investment; a great preponderance of railroad money is therefore represented by bonds which have no voice in the selection of the managements of these properties and no direct means of making known how present conditions are viewed excepting through the association I here represent. The bonds held by large mutual life insurance companies for the protection of policyholders and estates are usually held until their maturity; other investing institutions like mutual savings banks are also large permanent investors. So the class of investors largely represented is of a distinctly permanent character, whereas the stocks or railroads that elect their managements are more or less speculative and constantly change ownership.

WHY A "REASONABLE" RETURN SHOULD BE DEFINED.

At appearances before this committee and the corresponding committee of the House the association of security owners, in January, 1919, February and August of the same year, asked Congress to define what the term "reasonable"—the only guide the commission had at the time—meant in connection with the return on railroad property expected to be received from rates. We asked that a measure be placed in the act then under consideration as a guide to the commission in the making of rates an essential in so closely a Government regulated industry as the railroads, so that there might be ended the continual fight that was made before the commission at every rate hearing participated in by gentlemen who have appeared before this committee advocating the repeal of this measure now in the act and the return to the discarded rate methods of the past.

A "reasonable" return was asked to be named in the transportation act—not on bonds, nor on stock, nor on the so-called "water"—the term that the opponents of the act like to use—but on the value of railroad property, in the aggregate, devoted to public use. All that was asked was that a measure be set up—not a guaranty by the Government requiring the Government to make up any difference—but that the commission, which controls the life and death of the railroads, should be informed of what was to be the measure of a "reasonable" return, which up to the passage of the transportation act had not been defined.

We were advised by the highest legal sources obtainable that the measure of average return that was asked was not as great as the security owners would be entitled to receive in a court of justice.

As the basis to compute the return the commission was given power to establish the carriers in groups, computing the return on the aggregate value of the property of each group. This return is not computed on the value of the property of any single railroad in the group, and each railroad can earn on its own individual property value out of the aggregation of rates only what its efficiency in operation permits it to earn. If any one carrier in any group should earn on its individual property value more than 6 per cent, one-half of the excess was to be retained by the carrier, the other half to be paid into a fund to be used by the Interstate Commerce Commission for the benefit of the public in the interest of transportation as a whole.

PRESERVATION OF TRANSPORTATION AS A WHOLE THE OBJECTIVE OF RATE MAKING.

It is desirable to restate these provisions of the act in order that the reasons be briefly given for the recapture or division of the excess earnings of a carrier over and above 6 per cent provided in the act, since there has been recently filed with this committee a legal opinion or opinions that this section of the act is unconstitutional. Ever since regulation by the commission it was obviously impracticable for the commission to make rates to allow the great majority of the carriers of the country sufficient revenue to enable them to be operated in the public interest, unless certain carriers in the minority would receive from

such rates more than either the commission or the public would stand for. This was no fault of either the large majority of the carriers or the shippers who do business with them. It resulted from the fact that densely populated territories produce greater revenue to railroads operating therein than territory not so densely populated produce to carriers serving such territory.

It is as essential that shippers and inhabitants of sparsely settled territories—constituting the greatest area—should have railroad facilities adequate for their needs as that densely populated areas require greater facilities. So, to enable rates to be made to produce transportation as a whole, the regulation of excess earnings, although a very unpopular but necessary condition to adequate rates, was suggested by the security owners—that a division of the excess be made after the reasonable return of 6 per cent was earnd on its property value by any carrier.

It was this so-called recapture, taken in connection with and essential to secure the stated percentage return, that aroused opposition, not from shippers but from carriers that were unwilling to agree to a division of their excess earnings. We now understand, however, that all the carriers are opposed to any amendment to the transportation act.

During hearings before this committee, while the transportation bill was still under discussion in committee and before its provisions had been definitely formulated, a hypothetical case was presented to Mr. Charles E. Hughes by those who, as stated, were then opposing the provisions mentioned which was radically different in its assumptions from the measure that was actually passed by Congress; upon these assumptions Mr. Hughes gave an opinion which has been filed before this committee. It is only necessary to say that while it is the opinion of a lawyer of the greatest eminence, it is not an opinion as to the constitutionality of the act as it has become effective.

JUDGE TAFT AND OTHERS ON CONSTITUTIONALITY OF ACT.

In support of the constitutionality of the act, I desire to file with the committee at the end of this statement the opinions of the attorneys of the association taken when we appeared in 1919, viz., ex-Senator Root, Mr. Milburn, Mr. Miller, Mr. Johnston, Mr. Brown, and Mr. Walter. In addition I will similarly file in the record an article by Judge William H. Taft, before Judge Taft became Chief Justice of the Supreme Court, that appeared in the Philadelphia Public Ledger. This article characterizes the transportation act not only as a highly constructive measure but clearly shows Judge Taft's opinion as to the constitutionality of the provisions of the act that relate to the stated percentage return and regulation of excess earnings. If the committee will permit, I will read several extracts from Judge Taft's article, although it is hardly necessary to burden this committee with a discussion as to the constitutionality of the act, there are too many able constitutional lawyers, members of the committee, to require such action. I quote in part from the article by Judge Taft, dated January 15, 1920. Mr. Taft said:

"The problem which Senator Cummins has sought to solve is how uniform and reasonable rates may be fixed for the various railroads of the country so as to enable all of them to live and to prevent any of them from enjoying excessive dividends. To fix rates so low as directly to keep the dividends of certain railroads within reason would create impossible deficits for others in competition.

"The weaker railroads are necessary to the regions which they serve and must be maintained. If private operation is to continue how can the matter be adjusted? Senator Cummins's method is to divide the country into rate districts in which conditions are similar, to ascertain the value of all the railroads within the district and then to fix rates at such a level that the net return for the use of these properties shall be 5½ per cent on their value, with half a per cent more to be used by the railroad in nondividend-producing improvements. Any railroad earning more than this is to divide the surplus up to 7 per cent equally with the Government; its half a per cent to be put in a reserve fund and the Government's half a per cent to be used to create a railway contingent fund. * * * The changes in the present system proposed are highly constructive. * * * The attacks upon them from different quarters and adverse interests are to be expected and may confirm an unbiased favorable view. * * *

"The merits of the Senate bill are that it furnishes a reasonable standard for the action of the Interstate Commerce Commission in fixing rates. It requires primarily the fixing of rates enabling the railway companies of the country to live and to pay a reasonable income on their property. With that as a fundamental rule, the rest of the problem will work itself out, because the change will restore confidence in railway properties as an investment. The deplorable phase of the present situation has been the impossibility of securing capital to make needed new construction.

"The 5½ per cent standard of rates has been called a guaranty, and has attracted criticism and objection. Shippers and certain groups of the interested public are not content to give up their fancied advantage in the present unsatisfactory system by which railroads are made to work for insufficient pay. Such a result in the end works against the shippers because it reduces the possibility of adequate facilities and injures the whole railway service. But he can not be made to see this. Five and one-half per cent on a value fixed by the commission itself, after the fullest investigations, is not an excessive rate.

"On the other hand, objection comes from the successful railroad companies that this is not enough for them. They object that it is confiscation to take away from them an excess over 6 per cent and compel them to divide that excess with the Government, and, therefore, it is unconstitutional. The police power which may be exercised in the regulation of the rates charged by the railroad is ample for the purpose. It is not limited to any particular method by which those rates and the revenues from them shall be kept within reason. Rates may be fixed directly or they may be fixed with reference to the dividends which they bring, so that when the railroad actually receives its net revenue it becomes a trustee of the receipts until the fair return may be determined. It is only rate fixing after all."

Judge Taft's opinion is conclusive.

CONDITIONS SINCE ACT BECAME EFFECTIVE.

The conditions since the transportation act became effective, in so far as the section of the act under discussion is concerned, should be considered.

The war brought about unusual and unprecedented conditions through which the world has been passing and to which there has been no exception. The railroads had no control over the extreme paralysis of business which was foreseen by economists as the result of such a devastating war. An economic readjustment has been taking place which no power, no legislation could correct. It is gradually correcting itself with the aid of the administration and Government and through efforts put forth in every State and in every community to help along readjustment to a point where we will again see the normal trend of business and agricultural affairs.

What have the railroads been doing to help this situation? They have stood by and have cooperated in the reduction of rates to help business and agriculture, without respect to whether the yield called for by the transportation act was received or not. Let me emphasize, Mr. Chairman, that the yield received is far below a return we are advised that the Supreme Court, if called upon, would likely decide could legally be expected on the property of the regulated railroads devoted to the public use and reaching a point constituting confiscation of property.

The farmers whose representatives are opposing the act are just as greatly concerned in seeing that these arteries of commerce receive revenue sufficient to haul their products as are the owners of railroad securities. Their interest is a common interest.

With all due respect to the efforts of the farmers and their representatives who are pressing destructive amendments to the transportation act, it is earnestly suggested that they would accomplish much more for themselves and for the community as a whole in the reduction of freight rates and in the improvement of transportation service if they would turn their attention to the constructive measures which the association of security owners have proposed before this committee and would support these measures to secure substantial economies in railroad administration as vigorously as they are now attacking the transportation act.

It had long been evident that unless an offset was found to the natural trend of the demands made on transportation and the exactions constantly made for

lower freight rates when business depression occurred, sufficient revenue would not be forthcoming for the proper operation of the carriers. Apart from the desirability of the adoption of methods of economical railroad administration from the standpoint of lower freight rates, it is the opinion of many that their adoption is necessary if the continuance of private operation is desired. The suggestions made are in the records of the committee of January and February, 1919. In June last they were repeated and laid before this committee in more advanced and completed form.

OPPORTUNITY SHOULD BE AFFORDED TO SECURE BENEFITS OF ACT.

To work out the problems involved, the association appointed a number of well-known engineers to constitute a board of economics and engineering. This board has prepared data in respect to the subjects here discussed. Col. Molitor, its chairman, will present it.

In addition to Mr. Forney Johnston and Mr. Walter L. Fisher, of counsel, it was thought advisable to ask Mr. Edgar E. Clark to appear here because of the testimony before the committee concerning the alleged failure of the Interstate Commerce Commission to cooperate with the State commissions under the terms of the act. Mr. Clark's great experience as a member of the Interstate Commerce Commission for 15 years, and its chairman when he recently resigned, it was believed would be helpful to the committee in this and other phases of the subjects under discussion.

In conclusion let me say that in testimony before the committee it has been intimated that its work in framing the transportation act was hastily performed. This country, we believe, fully appreciated the enormous work performed by the Senate and House Committees on Interstate Commerce during the months of hearings and investigation. This committee's interpretation of the necessities of transportation in the endless investigations made and the consideration given the subject from every standpoint and detail has been recognized on every hand. It was only after the most exhaustive investigation by this committee that the transportation act was framed, which has been indorsed by the country generally as the most constructive railroad legislation placed on the statute books in years.

It is very unfortunate that the conditions of the times have not permitted the results of the efforts of the committee and of Congress in framing this act to be fully ascertained. It is to be hoped that the coming of normal times will admit of this. To permit destructive amendments to impair the effective work of this committee, before the opportunity has been afforded to secure or at least test the benefits to be attained therefrom, we feel would be unthinkable to a great majority of the people if it was realized that such action would be considered.

If there is no objection I will file a communication from the committee on public relations of the association dealing with the subjects under discussion rather than take the time of the committee in reading it.

Mr. Chairman, there are here present a number of representatives, officials of leading investing institutions of the country—mutual savings banks and life insurance companies. The mutual savings banks, as you know, have enormous deposits; they represent some 11,000,000 of depositors with about $6,500,000,000 of deposits. Over one-sixth of those deposits, Mr. Chairman, $1,000,000,000, are invested in railroad securities. These institutions are mutual. Those securities belong to the 11,000,000 depositors.

The life insurance companies have millions of policyholders whom we very largely represent. I am not going into detail as to that, because it has been stated so often before your committee. These gentlemen, Mr. Chairman, are represented by this rather remarkable group of men here. They come here entirely unsolicited. If we had solicited the investors of the country I am afraid you would not have had room to accommodate them. The gentlemen here asked about this act, about what was going to be done, and they volunteered to come down here and state their views in a short statement, if you will be good enough to hear them. It will not take very long.

I will introduce Mr. George E. Brock, president of the National Association of Mutual Savings Banks, and president, also, of the Home Savings Bank of Boston.

STATEMENT OF MR. GEORGE E. BROCK, BOSTON, MASS., PRESIDENT NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS.

Mr. BROCK. Mr. Chairman, here is a statement which has been prepared and signed by those who have come with us to Washington at this time. I will read it:

THE INTERSTATE COMMERCE COMMITTEE,
United States Senate:

We, the undersigned representatives of mutual savings banks, having held numerous conferences regarding the Capper bill (S. 1150) and given it careful consideration, have come to Washington to respectfully request to be heard so that our opposition to this proposed measure may be placed on record. We make this request without solicitation, but from a deep sense of duty to 11,000,000 depositors.

We are opposed to the Capper bill (S. 1150) for the following reasons:

We respectfully submit that the transportation act, 1920, by requiring the Interstate Commerce Commission so to regulate rates that the railroads as a whole or by groups may earn "as nearly as may be" a fair return upon the aggregate value of their property, and also by providing a method for determining such a fair return, tends to stabilize the value of outstanding railroad securities and improve the credit of the railroads. We are of the opinion that, owing to the recent business depression, results up to the present are not a true indication of the worth of the act, and therefore we strongly urge that it be given further trial, feeling confident of favorable results under normal conditions.

Before the passage of the present act, when revenue considerations were either not given sufficient consideration for the carriers as a whole, or if considered, were not given effect, the whole situation was rapidly becoming chaotic—and the attempt of the proposed Capper bill to restore the old condition is a decided step backward and a menace to the entire railroad situation.

The mutual savings banks hold $1,000,000,000 of railroad bonds. This means that every savings bank depositor has a direct pecuniary interest, as well as a general interest as a citizen, in the welfare of the railroads to the extent of 18 per cent of the amount of his savings. For example, Maine has 36 per cent of its savings deposits invested in railroad securities; Connecticut, 34 per cent; Massachusetts, 20 per cent; and New York, 16 per cent.

Mutual savings banks have no capital stock, and so all earnings go to depositors. Their trustees do not receive any financial compensation or personal benefit in any way, their service being given solely because of patriotic devotion to their communities and a benevolent desire to help fellow citizens of modest means. Under the obligations imposed by such service we and all other trustees and officers consider it our duty to oppose any amendment that might cause the railroads to fall back into the perilous situation from which they were saved by the transportation act, 1920.

We therefore desire as trustees of the mutual savings banks, representing 11,000,000 people to go on record as asking for a courageous and statesmanlike attitude toward this problem. We urge that the railroad question be approached open-mindedly and with a breadth of view that will eliminate all purely local and selfish considerations, and that no backward step be taken that will imperil this great industry.

The institutions below subscribe to the foregoing:

Central Savings Bank in the City of New York, A. Koppel, vice president.

Williamsburg Savings Bank, Brooklyn, N. Y., V. A. Lersner, comptroller.

Union Square Savings Bank, New York, F. C. Mills, treasurer.

The Bowery Savings Bank, New York, W. E. Knox, vice president.

The Savings Bank of Utica, New York, H. A. Hilsinger, treasurer.

The Staten Island Savings Bank, Staten Island, George S. Humphrey, vice president.

Richmond County Savings Bank, West New Brighton, J. F. Smith, president.

Jefferson County Savings Bank, Watertown, N. Y., A. T. E. Lansing, secretary and treasurer.

Watertown Savings Bank, Watertown, N. Y., I. L. Hunt, president.

The Bank for Savings in the City of New York, Lewis S. Gawtry, vice president.

Green Point Savings Bank, Brooklyn, N. Y., George W. Felter, president.

Lynn Institution for Savings, Lynn, Mass., C. A. Collins, president.

Salem Five Cents Savings Bank, Salem, Mass., H. P. Gifford, treasurer.

Institution for Savings, Newburyport, Mass., William Balch, treasurer.

Springfield Institution for Savings, Springfield, Mass., John W. B. Brand, treasurer.

Home Savings Bank, Boston, Mass., George E. Brock, president (also president National Association of Mutual Savings Banks).

Piscataquis Savings Bank, Dover, Me., Frank E. Guernsey, president.

Torrington Savings Bank, Torrington, Conn., John M. Wadhams, treasurer.

Bridgeport Savings Bank, Bridgeport, Conn., Samuel M. Hawley, president.

Stamford Savings Bank, Stamford, Conn., J. Howard Bogardus, treasurer.

South Norwalk Savings Bank, South Norwalk, Conn., George L. Woodward, treasurer.

Bangor Savings Bank, Bangor, Me., W. A. Danforth, treasurer.

National Association of Mutual Savings Banks, Milton W. Harrison, secretary.

Brooklyn Savings Bank, Brooklyn, N. Y., L. E. Sutton, comptroller.

Emigrant Industrial Savings Bank, New York, John J. Pulleyn, president.

In addition to that we have present with us some representatives of life insurance companies, who have appended this statement:

The life insurance companies of the country hold about $1,700,000,000 of the securities of the railroads.

These companies represent about 34,000,000 holders of life-insurance policies.

We, the undersigned, hereby concur in the above statement made by representatives of mutual savings banks and affirm our belief that the passage of the Capper bill (S. 1150) would injuriously affect life insurance companies and their policy holders.

For the reasons set forth in said statement, we come here to oppose the passage of said bill.

HAROLD PALAGANO,
Treasurer New York Life Insurance Company.

WM. W. MCCLENCH,
President Massachusetts Mutual Life Insurance Company.

JOHN G. WALKER,
President Life Insurance Company of Virginia.

W. J. TULLY,
General Solicitor Metropolitan Life Insurance Company, New York.

WASHINGTON, D. C., *November 16, 1921.*

(The legal opinions and other data submitted by Mr. Warfield in his statement are here printed in full, as follows:)

OPINIONS OF COUNSEL OF NATIONAL ASSOCIATION OF OWNERS OF RAILROAD SECURITIES, AS APPROVING CONSTITUTIONALITY OF ACT.

NEW YORK, *January 23, 1919.*

S. DAVIES WARFIELD, Esq.,
President National Association of Owners of Railroad Securities,
Baltimore, Md.

DEAR SIR: We have carefully examined and considered the proposed plan for the return of the railroads to private operation submitted to us as it appears in the revised proof of January 22.

We understand the plan to contemplate that Congress shall limit by law the amount of compensation which each railroad company shall be entitled to receive for its services to an aggregate amount sufficient to yield a specified return upon its investment, and that the particular rates fixed under the supervision or direction of the Interstate Commerce Commission or other similar commissions will be tentative, and as to the results thereof subject to comparison with the primary limitation upon the aggregate amount, and that the so-called excess earnings for the distribution of which the plan provides will be that part of the sums which may be received by the railroad company in accordance with the tentative particular rates, but which the company is not entitled to retain as its own under the limitation upon aggregate receipts established by law.

With this understanding, we are of the opinion that Congress has the constitutional authority to pass an act to carry into effect the essential features of the plan.

Very truly, yours,

ELIHU ROOT.
JOHN G. MILBURN.

BALTIMORE & OHIO RAILROAD CO., LAW DEPARTMENT,
Baltimore, Md., January 19, 1919.

Mr. S. DAVIES WARFIELD,
President National Association of Owners of Railroad Securities,
Baltimore, Md.

DEAR MR. WARFIELD: In my opinion Congress has constitutional authority to pass an act to carry into effect the essential features of the plan in connection with the return of the railroads to their owners sent me with your letter.

Yours, very truly,

HUGH L. BOND, Jr.,
General Counsel.

MILLER, STARR, BROWN, PACKARD & PECKHAM,
LAW OFFICES, 1522 FIRST NATIONAL BANK BUILDING,
Chicago, January 20, 1919.

Mr. S. DAVIES WARFIELD,
President National Association of Owners of Railroad Securities,
Baltimore, Md.

DEAR SIR: I have examined the plan of your association which has been prepared for submission to the Interstate Commerce Committee of the United State Senate as the basis for legislation by Congress looking to the return of the railroads engaged in interstate commerce and for their regulation; and in reply to your request for my opinion whether Congress has the constitutional authority to pass an act to carry into effect the essential features of such plan, I beg to say that in my opinion Congress has such authority.

Very truly, yours,

JOHN S. MILLER.

BIRMINGHAM, ALA., *January 24, 1919.*

Mr. S. DAVIES WARFIELD,
President National Association of Owners of Railroad Securities,
Baltimore, Md.

MY DEAR MR. WARFIELD: In reply to your letter requesting opinion as to the power of Congress to give effect to the essential features of the plan which is to be submitted to the Senate Committee on Interstate Commerce as the basis for comprehensive interstate railway regulation, I have to advise that I have considered the matter at length and am of the opinion that Congress has full power to enact the necessary legislation.

I do not consider that the power of Congress would be transcended by the provision for the recapture in the public interest of operating income in excess of a reasonable return on the property investment, essential in any horizontal or adequate system of regulation, even if it involved slight changes in the common-law relationship between shipper and common carrier.

It is also clear that the percentage of income which the railroads will be permitted to receive under the plan, either according to the ratios suggested or as subject to adjustment after hearing, would be more than equivalent to the net intrastate income of the railroads coming under the plan, thus removing any possible suggestion that Congress would be attempting to make disposition of income not subject to Federal control.

Assuming, as clearly contemplated by the plan, that the statutes enacted would provide for hearings in all cases of dispute as to return or compensation, I find that the plan involves no important feature which could not be adjusted to valid and effective congressional enactment, conserving fairly those functions of essentially local initiative and control upon which Congress can not encroach, however earnestly that result may be intended by other programs submitted to Congress.

Yours, very truly,

FORNEY JOHNSTON.

HORNBLOWER, MILLER, GARRISON & POTTER,
24 Broad Street, New York, January 23, 1919.

S. DAVIES WARFIELD, ESQ.,
President National Association of Owners of Railroad Securities,
The Continental Building, Baltimore, Md.

DEAR MR. WARFIELD: Replying to your letter inclosing a final copy of the plan in connection with the return of the railroads to their owners and asking me to

advise you whether in my opinion the Congress has the constitutional authority to pass an act carrying into effect the essential features thereof, I beg to express my opinion in the affirmative. As the plan has matured, I have carefully considered the several constitutional questions involved and while some of the applications involved are new, am satisfied that under established principles the necessary legislation can be constitutionally framed by Congress.

Very truly, yours,

B. H. INNESS BROWN.

LAW OFFICES, BORDERS, WALTER & BURCHMORE,
1630 FIRST NATIONAL BANK BUILDING,
Chicago, January 22, 1919.

MR. S. DAVIES WARFIELD,
President National Association of Owners of Railroad Securities,
Continental Building, Baltimore, Md.

MY DEAR MR. WARFIELD: Replying to your letter, I beg to say that I am of the opinion that Congress has the authority under the Federal Constitution to embody the fundamentals of your plan for the return of the railroads to private ownership in legislation appropriate to carry such fundamentals into effect.

Very truly, yours,

LUTHER M. WALTER.

(The following article was filed by S. Davies Warfield in his statement before the committee:)

[National Association of Owners of Railroad Securities. Extracts from editorial in the Public Ledger, Philadelphia, Pa., Jan. 15, 1920.]

CUMMINS RAILWAY BILL A CONSTRUCTIVE MEASURE—A SEVERE CRITIC OF TRANSPORTATION CORPORATIONS, HE HAS EVOLVED A SYSTEM THAT PROMISES WELL.

[By William Howard Taft. Copyright, 1920, by Public Ledger Co.]

The Senate bill for the restoration of the railways of this country to their owners and for their reconstruction is largely the work of Senator Cummins. He has been ably assisted in the task by Senator Kellogg. No one can read the bill and its accompanying report and the speeches of Senators Cummins and Kellogg on the bill without the conviction that it was drawn by statesmen who have given much time and study to the consideration of our railroad problem and have now made up their judgment, ripened by close observation.

Senator Cummins has not been prejudiced in favor of the railroads of the country. He has been one of their severest critics. We may infer from what he says, that, theoretically, he is in favor of Government ownership; but he has yielded his views on this subject to the argument that Government ownership is impossible because of the enormous expense of its operation.

Executive and judicial functions are united in the Interstate Commerce Commission to the prejudice of each. The executive function in regulating the rightful, useful, and safe operation of the railways may easily be separated from the quasi-judicial work of fixing rates, and may be better attended to by a separate board peculiarly qualified. The Cummins bill provides a new board called a transportation board, of five members, to which it assigns not only the executive duties already referred to, but also certain new duties made necessary by its constructive features.

The problem which Senator Cummins has sought to solve is how uniform and reasonable rates may be fixed for the various railroads of the country so as to enable all of them to live and to prevent any of them from enjoying excessive dividends. To fix rates so low as directly to keep the dividends of certain railroads within reason would create impossible deficits for others in competition. The weaker railroads are necessary to the regions which they serve and must be maintained. If private operation is to continue, how can the matter be adjusted? Senator Cummins's method is to divide the country into rate districts in which conditions are similar, to ascertain the value of all the railroads within the district and then to fix rates at such a level that the net return for the use of the properties shall be 5½ per cent on their value, with half a per cent more to be used by the railroads in nondividend-producing improvements. Any railroad earning more than this is to divide the surplus, up to 7 per cent, equally with the Government; its half a per cent to be put in a

reserve fund and the Government's half a per cent to be used to create a railway contingent fund. Should the revenue of any railroad exceed 7 per cent, one-fourth of that excess is to go into the railway reserve fund and three-fourths into a Government railway contingent fund. After the reserve fund of the railroad shall have reached and is maintained at 5 per cent of the value of its capital, the division of the excess over 6 per cent between the railroad and the Government is one-third to the railroad for such uses as it chooses and two-thirds to the Government railway contingent fund.

* * * * * * *

The merits of the Senate bill are that it furnishes a reasonable standard for the action of the Interstate Commerce Commission in fixing rates. It requires primarily the fixing of rates enabling the railway companies of the country to live and to pay a reasonble income on their property. With that as a fundamental rule, the rest of the problem will work itself out, because the change will restore confidence in railway properties as an investment. The deplorable phase of the present situation has been the impossibility of securing capital to make needed new construction.

The 5½ per cent standard of rates has been called a guaranty and has attracted criticism and objection. Shippers and certain groups of the interested public are not content to give up their fancied advantage in the present unsatisfactory system by which railroads are made to work for insufficient pay. Such a result in the end works against the shipper, because it reduces the possibility of adequate facilities and injures the whole railway service. But he can not be made to see this. Five and one-half per cent on a value fixed by the commission itself, after the fullest investigations, is not an excessive rate.

On the other hand, objection comes from the successful railroad companies that this is not enough for them. They object that it is confiscation to take away from them an excess over 6 per cent and compel them to divide that excess with the Government, and therefore it is unconstitutional. The police power which may be exercised in the regulation of the rates charged by the railroads is ample for the purpose. It is not limited to any particular method by which those rates and the revenues from them shall be kept within reason. Rates may be fixed directly or they may be fixed with reference to the dividends which they bring, so that when the railroad actually receives its net revenue it becomes a trustee of the receipts until the fair return may be determined. It is only rate fixing after all.

Federal incorporation of the railroads has often been proposed. One of its benefits will be the real independence of State nagging which such incorporation secures. Interstate railroads are the arterial system of the whole country, and they ought to be panoplied with the armor of Federal incorporation. The Cummins bill, of course, subjects these national railroad corporations to State taxation but imposes the same restriction as that upon State taxation of national banks, namely, that the property shall not be more heavily taxed than other property of the same kind in the State. This will help protect them. Indeed, when they become Federal corporations the burden of the 48 different State taskmasters, to which they have heretofore been subjected, will be materially less.

The changes in the present system proposed are highly constructive. They are novel, but that does not prevent their being a solution of the difficulties. The attacks upon them from different quarters and adverse interests are to be expected and may confirm an unbiased favorable view.

Space does not permit comparison with the Esch bill, which has passed the House. The two bills are now in conference. It will need another article to discuss their differences.

(Communication from committee on public relations filed in S. Davies Warfield's statement before committee:)

CONSOLIDATION OF RAILROADS.

[National Association of Owners of Railroad Securities—National Railway Service Corporation. Headquarters, Baltimore, Md.]

DEAR SIR: A plan for the consolidation of the railroads of the country into 20 large railroad systems, prepared at the instance of the Interstate Commerce Commission, has recently been made public. The commission has not as yet

indorsed this or any particular plan, but has announced that public hearings will be held thereon.

The transportation act of 1920 (Esch-Cummins Act) directs the commission to formulate a plan for the consolidation of the railroads of the country into no less than 20 or more than 35 large systems. While the plan finally adopted by the commission can not, under present laws, become effective without the assent of the security owners of the railroads, nevertheless all future consolidations of any railroads by whomsoever suggested or desired are required by the act to conform to whatever countrywide plan the commission now decides upon. It will be seen how vitally important it is that the basis for consolidations established by the commission shall be fundamentally sound from the physical, traffic, operating, and financial standpoints. The commission is directed to hold public hearings in respect to the plans proposed.

One of the requirements of the act is that all consolidations shall be based on the valuation of the properties of the respective carriers, as determined by the commission, in that the amount of the securities to be issued by each new consolidated company shall not be greater than the aggregate ascertained value of the properties of the constituent railroads.

This association, in recognition of the importance—both as to the valuation to be placed on the properties and the conditions under which consolidations coming within the meaning of the act are to be attempted—appointed a board of economics and engineering, of which you have been previously advised, to make an exhaustive study of this among other problems.

The proposed large consolidations will have far-reaching effect upon all railroad securities, as well as on the ability of the carriers when consolidated to render an adequate and efficient public service. If there is a time when those who own the securities of railroads should prepare to meet the questions now presented, it is when their assent is essential to effect so complete a change as is contemplated in the relation of their securities to the properties that issued them, and which may adversely affect their value.

It is self-evident that an impartial analysis of any plan of consolidation or of the questions to be considered in reaching conclusions in respect to consolidations, under the terms of the act, can best be attained through an agency representing, in its broadest aspect, all classes of securities issued by all carriers rather than by any particular railroad. Such an agency is presented in the board of economics and engineering appointed by this association. To further extend the effectiveness of its work the board has been clothed with full power of independent action. Its members, in addition to their recognized qualifications for this work, were impressed with the fact that the first consideration should be the public interest, as no plan of consolidation can be effective that is not founded principally on an efficient transportation public service economically administered.

The board is engaged in an exhaustive study of the subject, with a view to analyzing the plan of consolidation now before the commission, above referred to; such other plans as may be proposed either to or by the commission, and to endeavor to work out or see if there can be worked out, in the public interest, a plan from which may be obtained the results expected to be secured under the requirements of the transportation act.

This association, before the committees of Congress and elsewhere, has given expression to the many difficulties, practical and legal, surrounding the questions involved in these consolidations. During the progress of the legislation leading to the transportation act the association contended that consolidations should be made permissive and not compulsory. The act does not attempt to enforce them.

In pursuance of this work by the board the cooperation of the executives of the railroads of the country has been asked, both in the supplying of data necessary to a comprehensive study of the subject and in the way of any suggestions in respect thereto. It has been made plain that such study and suggestions as the board may make will be available to any railroad they affect, and that before action is taken by the board its conclusions or suggestions will first be submitted to the railroads concerned.

It is not proposed to unduly hasten so important a work. Public hearings before the commission on plans of consolidations that are not based on the intensive study that is essential to insure their practicability and effectiveness will prove disturbing in an already disturbed railroad situation. The undersigned committee, therefore, hopes that the Interstate Commerce Commission before acting in the premises will afford full opportunity for the careful and

extensive investigation which the board of economics and engineering has undertaken.

Your cooperation is asked in such directions as you may find it possible to assist in the work before us. The board of economics and engineering, with a competent staff, is located in offices at 60 Broadway, New York City.

GEORGE E. BROCK,	JOHN J. PULLEYN,
JOHN H. DEXTER,	HENRY A. SCHENCK,
HALEY FISKE,	JOHN M. WADHAMS,
DARWIN P. KINGSLEY,	S. DAVIES WARFIELD, *Ex-officio,*
W. W. MCCLENCH,	*Committee on Public Relations.*

Mr. WARFIELD. Mr. Chairman, the understanding was that we were to take an hour of the time, which has almost been taken up. Therefore, we will give way to Mr. Scandrett, who gave way to us. Mr. Fisher, who was expected to be heard to-day, will remain over until to-morrow, so that he and Mr. Scandrett will make their arrangements with respect to the division of time if there is no objection.

The CHAIRMAN. You do not care to continue now?

Mr. WARFIELD. My understanding with Mr. Scandrett was that we would give way at this time, since he gave way to us.

The CHAIRMAN. I ask because I had stated to Mr. Fisher that he could be heard Thursday morning; but if he is satisfied we will hear him to-morrow.

Mr. FISHER. I have arranged to stay over until to-morrow. I should be very willing to go on at this time if there was any substantial period left, but I understand the Senate convenes at 11 o'clock.

The CHAIRMAN. Well, I think we may remain here until we are sent for.

Mr. FISHER. I understand that Mr. Scandrett was interrupted, or, rather, gave way in the midst of his statement, and it was planned that he might resume. That is satisfactory to me; either plan is satisfactory to me. I shall be here to-morrow morning.

The CHAIRMAN. We may have an opportunity to hear you to-day. Mr. Scandrett, you may resume your testimony.

STATEMENT OF HON. EDGAR E. CLARK, WASHINGTON, D. C.

Mr. CLARK. Mr. Chairman, for the benefit of the record, I will say that my name is Edgar E. Clark. I appear here at the request of Mr. Warfield, representing the Association of Owners of Railway Securities.

I want to make it clear, to begin with, that in requesting me to appear Mr. Warfield has made no suggestion whatever as to what position I should take or as to what I should say; he simply asked me to come here and say what I think.

Inasmuch as I was a member of the Interstate Commerce Commission when a good many of these cases referred to in this record were decided, and when questions of policy on the part of the commission were determined, I may in the discussion in connection with some of the commission's acts use the first person plural and say "we." But I do not assume to speak at all for the Interstate Commerce Commission, except so far as I refer to matters at a time when I was a member of that commission.

I want to refer briefly to some elementary things, not because I doubt the familiarity of the members of the committee with those things, but as tending, as it seems to me, to clarify the record.

I start with some simple but fundamental propositions. We must have transportation by railroad, and that transportation machine must, in general, be adequate for the needs of the Government in national affairs, and of business in domestic affairs. That transportation must be provided in some way by the Government. It may do it directly, or it may arrange to have it done as it has always been done in this country, by an agency which consists of private capital and private operation. It is obvious that private capital will not embark in transportation enterprises, unless there is a reasonable prospect of a fair return on the capital; a fair profit from the undertaking.

We adopted in this country the principle of privately-owned railroads, and in the earlier days the Government lent support and assistance to construction of railroads in the newer parts of the country, as an encouragement to projects which probably could not at that time be carried through without government aid. It was not until 1887 that the Government decided upon a policy of

exercising any regulation over the affairs of the railroads. It then adopted the original interstate commerce act, or I should say, the act to regulate commerce, which announced, of course, the general principles and asserted the power of the Government to regulate them, and that action was assailed very vigorously.

OLD ACTS NOT EFFECTIVE.

The act was not very effective because of lack of power on the part of the administrative tribunal, and because of the phraseology of the act under which practically all important decisions by the Interstate Commerce Commission were set aside by the courts. Every effort that the Interstate Commerce Commission made to accomplish anything in the line of administering the act as the commission interpreted it, was resisted, and the commission was generally unsuccessful in the litigation.

In 1906 the Congress passed what was commonly called the Hepburn law, which gave the Interstate Commerce Commission much groader, more definite powers, and for the first time conferred upon the Interstate Commerce Commission the power to prescribe a rate. That, what I term progressive action along this line of legislation, was the subject of a great deal of criticism. The commission, in carrying out the duties imposed upon it by that act, became the storm center of most violent criticism, most of which can be summed up in the general accusation that the commission was starving the railroads to death. The commission, however, pursued the even tenor of its way, endeavoring to perform the duties that were laid upon it under the law, and regardless of this criticism, most of which the commission believed to be unwarranted and unjust.

In the hearings before this committee and before the House committee leading up to the enactment of the transportation act I presented some figures which covered a series of years beginning with 1906 and 1907, the first year in which the Interstate Commission had authority to fix rates, and which showed what the effect of those rates had been. It showed the rate of return year by year upon the book investment cost of railroads. It showed that the percentage of outstanding railroad stocks upon which dividends were paid had substantially increased, and it showed that the amount of percentage of dividend had also increased. Those figures are made up from the sworn reports of the carriers officially filed with the Interstate Commerce Commmission as required by the statute, and we, therefore, felt that they were the best evidence that the accusations that we were starving the railroads to death were unwarranted and unfair.

Now, the fundamental purpose of the act to regulate commerce, and all of the amendments that have been made to it, have been to terminate and prevent undue preferences to one patron and undue prejudices against another.

REPEAL WOULD MEAN RESUMPTION OF PRACTICE PERMITTING FAVORITISM.

The time was for many years when the rates were made on the theory of what the traffic will bear—and I do not use that expression in its offensive sense. What I mean is, that when an enterprise was formed, or an industry was opened, and the man who owned it or operated it asked for rates, the traffic manager, to whom he was required to apply for those rates, determined what rate he should have by determining what his cost of production was; what market he wanted to reach; and what competition he had to meet at that market. The traffic man determined whether or not he should meet that competition; determined whether or not he should be permitted to enter that market. If he elected to put him into that market, he would do so; if he elected not to do it, he would not do so. It is now proposed that we go back substantially to that same theory and that same practice.

Senator POINDEXTER. Just explain exactly, in brief, how the proposal would go back to that custom; how would the application of these proposals lead to that result?

Mr. CLARK. Well, let us assume a concrete case: There is a miller in Kansas City, Mo., served by a certain railroad that wants to enter the Kansas markets. There is a miller on the other side of the river, in Kansas City, Kans., that is served by a different carrier. If the Kansas State authorities can prescribe, without appeal and without any provision for reviewing their action, the rates from the Kansas City, Kans., mill to points in Kansas, and the traffic

manager of the line serving the mill in Kansas City, Mo., can be required to do nothing more than to make a reasonable rate, I say it is within the jurisdiction of that traffic manager to say whether or not that man will be permitted to ship into Kansas, in competition with the man on the other side of the river. And that is not an imaginary case, Senator, because the Interstate Commerce Commission has been called upon to deal with exactly that situation before the transportation act was passed.

There are prevalent, and there seems to be no limit to them, misunderstandings or lack of understandings, which seem to gain such ground as to create an almost universal sentiment. That was true with regard to the criticisms that were leveled upon the Interstate Commerce Commission after the act of 1906 was passed. The people who indulged in those criticisms did not know the facts, and they did not take the trouble to learn the facts. They assumed that their point of view was right, and they announced it without let or hindrance, and other people accepted it as coming from good authority, and even those who uttered them grew after awhile to believe them themselves.

There is existent now, as evidenced by this record so far as it has been printed, very widespread and unaccountable misunderstandings or lack of understandings as to what this law provides; as to what has been done under this law or as to what can or probably will be done under this law. Every amendment to the original act to regulate commerce has been adopted by the Congress for the purpose of meeting a real situation, for the purpose of correcting a real evil, or for the purpose of establishing a jurisdiction that would effect this purpose.

PRESIDENT TOLD CONGRESS THAT TO RETURN TO OLD CONDITIONS WITHOUT REMEDIAL LEGISLATION WAS UNTHINKABLE.

It is not necessary to recite in detail what led up to the temporary control of the railroads by the Government during the war period, or the conditions that were so created. The President of the United States, when the time came to return the railroads to their owners, addressed the Congress on that subject. He stated that it was the duty of Congress—I am not undertaking to quote him exactly—but he stated that it was the duty of Congress to provide legislation for adjustment of the accounts and relationships between the Government and the owners of the properties and for the future. He said that he had no ready remedy to suggest, but that they would be returned under old conditions and without remedial legislation was unbelievable and unthinkable.

The Congress addressed itself to legislation to meet the conditions which had been developed, conditions which were before the country and before the railroads. Congress knew, as everybody else knew, that the United States Government had for a substantial period been operating those railroads under operating expenses that exceeded the gross revenue from operations.

Of course, everybody knew that no private owners of properties could successfully operate them or could long be expected to operate them under such conditions. The necessity for increased revenues was obvious. The Congress undertook to establish a general policy which would provide those revenues; which would lend stability to the financing of the railroads and to the securities which the railroads had already uttered and which they might later utter.

It is doubtful if any single piece of legislation has been the subject of more comprehensive, patient, and exhaustive hearings by the committees of both Houses of Congress or of more exhaustive and careful analysis by the conferees than this transportation act had. It is a piece of constructive legislation. Two provisions of it are under attack here, as to which I have been asked to express my views. One is the so-called rule for rate making.

The Constitution of the United States has never guaranteed any capital invested in a public utility any particular percentage of return, or, in fact, any return whatever. But it has said and does say that the owners of that utility shall not be deprived of the opportunity to earn a fair return upon the value of the property which they devote to the public use. We have a long and unbroken line of decisions of the highest courts in the country that is the law under the Constitution. But for these misunderstandings that I have referred to it would seem to me that everybody who had any interest in the subject would have appreciated that that was the law, even though it were not written in the statutes.

RULE OF RATE MAKING ONLY A STATUTORY DECLARATION OF CONSTITUTIONAL PRINCIPLES.

The rule for rate making, which is here under attack, is only a statutory declaration of that constitutional provision, together with an outline of machinery by which it is to be carried into effect.

The Congress was, I think, very cautious and very conservative in determining what should be taken as a reasonable return on the value of the property for the two-year period succeeding the enactment of the law. It is significant that while fixing that return at 5½ per cent, with an additional authority upon the commission to increase it to 6 per cent. in the same act the Congress provided that the carriers should pay to the Government 6 per cent interest on money loaned by the Government to the carriers, and should pay 6 per cent on the indebtedness of the carriers to the Government which accrued during the period of Government control, and which was funded.

Prior to the enactment of this law. and during the hearings, a great deal was said about the impairment of railroad credit, and those who were interested in the securities of the railroads, including the members of this association, were very anxious that the Congress should declare a policy as a rule of law to be followed by the Interstate Commerce Commission and to control the commission in the performance of its administrative duties. As I have said, that rule or policy laid down by the Congress is in exact accord with a long line of decisions of the highest courts of the land with which the Congress was, of course, familiar.

The Interstate Commerce Commission undertook as best it could to meet the requirements and purposes of that provision of the law. Everybody knew, as I have said, that there must be substantial increases in rates.

The carriers were told by the Interstate Commerce Commission: You know better than anybody else what you ought to have; you know better than anybody else what you think you ought to have; and therefore you should address yourself to preparations of proposals which can be made the basis of hearings by the Interstate Commerce Commission in the investigation.

They did that, and they came forward with proposals for increases in freight rates. They did not propose at that time any increases in passenger fares.

There was pending, as was well known—it was a matter of public knowledge—a proceeding before the United States Labor Board, which was created also by the transportation act, which might, and many thought probably would, result in an award of large sums in increased wages to the railroad employees. That was adverted to frequently in the hearings which the Interstate Commerce Commission held in the investigation which it instituted upon the petition of the carriers. And shippers who appeared as witnesses in response to inquiries propounded by their own counsel affirmatively testified that they realized the probability that the Labor Board would award increased wages, the probability that that would necessitate adding to the total revenue which the carriers' proposals contemplated, and that they wanted that taken into consideration, and, if possible, that any increase so required should be included in one general adjustment in the rates rather than that they should have one on the carriers' proposals, to be followed by another one later, necessitated by the award of the Labor Board.

It happened that after the hearings had been concluded, and after the case had been submitted on oral argument, and before the Interstate Commerce Commission had determined the case, the Labor Board handed down a decision which granted increased wages to the railroad employees aggregating about $620,000,000 a year. That necessitated, of course, considering further sources of revenue. The carriers then filed a supplemental petition pointing out that in their judgment it would not do to get all of that revenue out of freight rates, and that it would be necessary to consider increases in the passenger fares in order to meet that situation.

STATE COMMISSIONERS INVITED TO SIT WITH INTERSTATE COMMERCE COMMISSION AT HEARINGS.

The Interstate Commerce Commission had invited the National Association of Railway and Utilities Commissioners—I do not state that title exactly, but it is the association which Mr. Benton represents, and is made up of the State railroad and utilities commissioners and of which the members of the Interstate Commerce Commission are also members—to appoint three of their mem-

bers to sit with the Interstate Commerce Commission in the hearings in this proceeding of investigation on the petition or application of the carriers for increased rates.

That invitation was accepted by the Association of Utilities Commissioners, and three commissioners, designated by the president and, I think, the executive committee of the association, came and sat with us throughout all those proceedings. They sat with us throughout our conferences in which the commission analyzed the record and discussed all of its various features, and they gave their assent to the decision which the Interstate Commerce Commission rendered.

I was not aware at that time and am not aware now of any substantial criticism of what the Interstate Commerce Commission did, until it became apparent a few months later, after the reaction from the war conditions had set in rapidly, that a lot of liquidation in business generally had to take place, and then the level of rates was complained of.

It happened that this increase in rates, necessitated by the conditions that I have recited, came after the readjustment for liquidation following the war conditions was beginning to appear, and so in a short time after these increased rates became effective they met with that difficulty. The peak of business had been passed and the recession had begun, although it had not become universal or general at that time.

For the first two months after the decision was rendered and under the operation of the rates, it appeared that if that condition could exist throughout the year the rates would do substantially what they were aimed to do, and that was to give the carriers a fair return of 5½ or 6 per cent on the value of their property devoted to the public use, fixed by the Interstate Commerce Commission under the act for the purposes of that case.

The Interstate Commerce Commission never accepted, as a reliable gauge, the property investment accounts of the carriers. It had occasion several times to discuss the unreliability of some of those accounts prior to the time, in 1907, when the accounts of the railroads were brought under a classification prescribed by the commission, as provided for in amendments to the act in 1906. But, in the absence of something better, it was taken as a general gauge. In connection with this effort, we were obliged to make the best estimate we could, availing ourselves of all of the information which we had gathered under the valuation provisions of section 19a of the act, but which were not yet ready to be made public. And we arrived at a lump-sum valuation, which was about a billion and a quarter of dollars less than the carriers insisted should be taken, they depending upon their property investment accounts.

Senator FERNALD (presiding). Do you remember the percentage, Mr. Clark, which you decreased their estimate by your valuation of the railroads; or what was the valuation placed by the commission?

Mr. CLARK. In round figures, the property investment accounts as urged upon the commission by the carriers was $20,000,000,000, and the commission took, for the purposes of that case, $18,900,000,000.

Senator FERNALD. About 5 per cent or a little more?

Mr. CLARK. Yes.

Now, after about two months of experience under these increased rates, business fell off very sharply. More or less readjustments of rates had been made, which involved some reductions in revenue, because while the Interstate Commerce Commission authorized as a necessary procedure a general increase in percentages it pointed out in its report the necessity for readjustments, in order to reestablish relationships that ought not to be disturbed and perhaps to correct rates that had been made unreasonable, and that those readjustments should be made, and the carriers pledged themselves to an effort to do it.

Of course, when the falling off of business began to be felt strongly there was impatience on the part of some to have that thing done, and done quickly. But the evidence which was afforded by the actual results from operation made it perfectly obvious that unless there was a change for the better, and a very sharp change, the net results from operation under those rates would fall far short of yielding 5½ per cent return on the property.

THOSE CLAIMING FREIGHT RATES WERE DESTROYING INDUSTRY WERE, IN MANY INSTANCES, MISTAKEN.

I have a great deal of sympathy for the conditions that the aftermath of the war have created for a good many industries. I have very keen sympathy for the difficulties that have been met by the agriculturalist and the horti-

culturalist. I can not imagine anything that does not involve human life or safety that can be more tragical than for a man to work a full year, to raise a crop, and then find that he can not dispose of his crop and get back what it has cost him. I can understand how they look at the freight rates, which they can see, and blame them, and therefore it is no criticism of those people when I say that in many instances where they said that the freight rates were destroying their industries and preventing them from marketing their produce they were mistaken.

Illustratively I might refer to a case which I handled, a case coming from growers of spinach in Florida, who shipped their produce to New York and other northern markets. They felt that the freight rate was what was bearing down on them and preventing them from getting a market and a fair price for their crop. I had the matter looked into in New York and found that the people who were selling the spinach in New York to the consumer were paying just one-half in New York, wholesale, as compared with what they had paid the preceding year. But they were retailing it at exactly the same price they had retailed it the preceding year, and they would not buy any more than they could sell at that price.

But a good many efforts were made and the Interstate Commerce Commission cooperated to bring about readjustments in a good many situations where it felt that the rates did bear with undue severity upon an industry.

I have not that same sympathy, however, for those whose claims for reduced rates since the close of the guaranty period were among the earliest presented and among the most persistently insisted upon, and to which the widest possible publicity was given, and which came from industries as to which disclosures in several principal cities of their arrangements among each other led to indictments for criminal acts under the antitrust laws in holding up their prices, while they were hiding behind the camouflage that it was increased freight rates that was preventing them from progressing.

RULE OF RATE MAKING CAN NOT BE BASED ON PROFITS ON ARTICLES TRANSPORTED.

While I am on that subject of rates I want to advert to an expression which was made by the chairman of the committee yesterday or the day before, that the contention was made that rates should be so adjusted that shippers will move their products and make a profit. Very naturally a shipper or producer, who must ship in order to market his product, needs rates that will permit him to market his product and make a profit. But it would be utterly impracticable to make that the rule of rate making for the carriers. If you do, you would get back to the conditions that prevailed before we had any provisions for rate making, and then the traffic manager of the carrier would say whether the shipper could get to a market. The man who has a longer haul to get to a market, as compared with the man who has a shorter haul, must have a relatively lower rate or he can not sell his product in competition with that man. And it would be impossible to make such a rate and adhere to all these provisions that there shall be uniformity of the rate as between persons and localities and between competing places on the railroads. The Supreme Court very pointedly decided that this act, and the administration of this act, did not and could not take away from places their advantages of location; it could not take away from the shipper the natural advantages of his location; that he must bear the disadvantages, if there are disadvantages, and that he is entitled to enjoy the advantages if they are advantages.

Now, in regard to this legislation, I understand that there has been some criticism of the idea of dealing with the carriers in groups. If there is anything that is patent from the terms of this act, reading the act as a whole and endeavoring to give effect to all of its substantive provisions, it is that the Congress had in mind a plan through which roads that for one reason or another—lack of traffic, unfortunate location, lack of development along the lines—were unable to operate with financial success in competition with more favorably situated and stronger competitors might get some relief. You will recall, of course, how much was said at that time about the necessity of doing something for the "weak sisters." And Congress adopted as a means of accomplishing something along that line, the only thing that it could adopt, that is to deal with the carriers by groups. It affirmatively stated in the act its recognition of the fact that that could not be done without some of the advantageously located roads earning more than they had a right to earn and more than they should retain, and therefore provided for the recapture of those excess earnings

It provided that regardless of advantageous location and favorable situations that part of the earnings in excess of 6 per cent should go into general funds, under governmental supervision, for the general benefit of the transportation of the country.

PUBLIC WELFARE PARAMOUNT TO ALL OTHER CONDITIONS.

The outstanding fundamental purposes of Congress in enacting this legislation, as I see it, and as I believe it is reflected throughout this act, is that the public welfare should be paramount to other considerations.

And so, in the action that I have just discussed, and in other actions, the Interstate Commerce Commission has, as directed, given special consideration to the necessities of the welfare of the commerce of the country and of the public.

Now, this grouping which was adopted by the Congress is concrete; it is written into the statute. But it did not create anything that was new. You can go back as far as the old Cincinnati Receivers' and Shippers' Association case, where they picked out what was then the Cincinnati, New Orleans & Texas Pacific Railway, from Cincinnati to Chattanooga, and attacked the rates on that line of railroad, leaving out of consideration the rates—leaving out of their pleadings all other railroads that competed for that business They showed the results from the operation of that railroad; they showed that it had heavy density of traffic, that it had reasonably good operating conditions, and that it could and did make more profit out of that traffic than any other railroad, and insisted that the rates should be fixed in the sole view of the results from that one fortunate and advantageously situated railroad.

The Interstate Commerce Commission rejected that theory, and said that it would not fix rates with a view only to the road which was the most advantageously located, and which could be more cheaply operated and make the most profit; they did not put out of view the railroads that were less advantageously located and that were operated under more difficult conditions.

The Interstate Commerce Commission adopted, as it comes to my mind at the moment, the same rule and announced it in unmistakable terms when an effort was made to attack the rates from Omaha to Denver only via the line of the Union Pacific Railroad. We declined to consider rates from that sole standard. We said, Here are these other railroads, the prairie railroads, that are operated under different conditions. They have got to have an opportunity to live; they have got to have an opportunity to compete for this traffic, and we will not make the rate so low as we would make it, perhaps, if the Union Pacific were the only railroad company there and its results were as they are.

And so I say the provision for dealing with them by groups, while it is new under the statute or as a matter of statutory law, the idea is not new, and it is not new in the administration of the law.

Now, what purpose can be gained by repealing this provision of the law? Certainly no one will assume that the Congress is going to do a vain thing. Dealing with this industry is a matter of interest not alone to this industry, which is second in magnitude and importance of all the industries of the country, and is fundamental to the success of every enterprise of industrial character and even to agriculture.

WHAT CAN BE ACCOMPLISHED BY REPEALING RATE-MAKING PROVISION?

I say nobody will assume that the Congress is going to legislate on some matter affecting that great interest unless it has a real purpose to accomplish; unless it is going to cure an evil that exists or prevent an evil that is threatened or accomplish some real good. What can be accomplished by repealing this provision? As I have pointed out, it is, in principle, the law as laid down in the Constitution as upheld by the courts, but on account of the misunderstandings or lack of understanding on the part of people who are interested in the financing of these railroads, interested in the securities which are outstanding—because they were anxious to have some plain declaration of policy by the Congress, Congress made that declaration. The purpose was to give some stability to railroad securities and railroad finances and to allay apprehensions that were extant as to the future of railroad credits. The purpose of it was to build up railroad credits.

Considerable has been said about the difficulties of getting new capital. I recognize the real accuracy of that term when its application is fully comprehended and understood, but I have often thought that it is a misunderstood

term for which some other might profitably be coined, because it is not a question of getting new capital alone, unless you consider as new capital that which it is necessary to raise to replace that which is in the property now. You may say, in one sense of the word, that when you have to refund a maturing bond issue you are looking for new capital, and you can say with equal accuracy that you are looking for an extension of time on old capital.

But it has all got to be done under the conditions as they exist at the time.

Certainly, this rule has not given the railroads immunity from the force of financial conditions. The railroads, with the best and strongest of credit in their financing and refunding, have been obliged to pay 7 and 7½ per cent for money, although they are limited to earning 6 per cent on their property, and it can not be assumed that they can borrow, on mortgage obligations, more than the value of their property.

Now, I feel safe in saying, Mr. Chairman—at least it is my judgment—that if this provision had not been in the act and the other conditions had been what they were, the decision of the Interstate Commerce Commission in the increased rate case, following the return from Federal control and made effective almost contemporaneously with the termination of the guaranty period, would not have been substantially different from what it was. The proceeding had every complexion of the old 5 per cent case and the subsequent 15 per cent case, except that it did not drag out like the 5 per cent case.

IN 1914 COMMISSION MADE FINDING THAT RETURNS TO RAILROADS WERE TOO LOW TO BE IN INTEREST OF PUBLIC.

As long ago as that 5 per cent case, in 1914, the Interstate Commerce Commission deliberately made a finding that the returns to the railroads involved in that case were too low to be in the interest of the public which they served. All of those principles have been there since; they have been brought forward here.

Now, how have they hurt anybody? The roads have not succeeded in approaching, even, 5½ per cent return on their property. The commission is required to fix a rate which will give that result, as nearly as may be, and that discounts all of the errors in the prognostications for the future, and all of the economic conditions that may prevail in the country.

All during the calendar year of 1920, the class I railroads as a whole spent 93 and a fraction—as I recall the figures now—93 and a fraction cents out of every dollar they took in, in the cost of earning that dollar, and while that is true, no railroad came to the commission and asked for further increases in rates. They realized that it would be suicidal. The Interstate Commerce Commission knew it, and did not hestitate to say so to them. There has been no effort to carry this beyond a point that would have been reached if this provision were not in the law.

Now, as I have come in contact with the members of this association, the owners of railroad securities, I have been impressed with their conservative views. They realize these facts; they realize that with that in there, there is no possibility of the railroads getting that annual measure of return until the railroads in the country, and the business of the country, have adjusted themselves so that that can be done under reasonable rates.

Senator POINDEXTER. What justification is there, Mr. Clark, for the assertion that the present conditions are the result of that provision as to guaranty?

Mr. CLARK. Absolutely none.

Senator POINDEXTER. That has been asserted throughout the country, that there is this provision as to guaranty of a profit to this particular industry, while others do not have it.

Mr. CLARK. When that statement is made, Senator, I regard it as being made in the absence of a knowledge of the facts, or with a purpose to misrepresent the facts. That it is not a guaranty is evidenced by the phraseology of the act itself, to start with; by the interpretation that has been placed upon the act, and by this fact, which neither the railroads, nor the Interstate Commerce Commission, nor the Congress can get away from—that whenever the rates are as high as the traffic will bear, as high as will permit a movement of the traffic, any further increases in rates reduces revenues.

And so, as it was during the latter part of 1920, if it be assumed that the obligation was on the Interstate Commerce Commission to put the rates high enough so that theoretically they would reach 5½ per cent to the carriers—that being done, the result would have been in direct conflict with the purposes

of the act, as stated in this provision, because it says they shall adjust them so that the net may be as nearly as possible this amount. And everybody that knew anything about the situation knew that any further increases would reduce the net, and get them farther away from any net earnings.

RATE-MAKING PROVISIONS HAVE EFFECTED SOME STABILITY IN SECURITIES.

This provision has effected some stability in railroad securities. It is looked upon by real investors—those who buy those securities as investments, buy them and put them away in their vaults until maturity—it has satisfied them, so long as the security is ample and the interest is paid when due. It never has done anybody any hurt; it has done some good; it can not possibly do anybody any hurt if it is left alone. And so I answer the suggestion that inasmuch as it is not doing any good it might as well be taken out with a stronger suggestion, as I see it, that it has done some good, it is doing some good, and it can not possibly do any harm, and therefore, why take it out and do a vain thing.

Senator FERNALD (presiding). Mr. Clark, I think perhaps we had better recess here, and convene at 2 o'clock sharp in the Capitol Building.

(Thereupon, at 12 o'clock and 30 minutes p. m., the committee stood on recess until 2 o'clock p. m. of the same day.)

AFTER RECESS.

The committee met at 2 o'clock p. m., pursuant to recess, Senator Fernald presiding.

The CHAIRMAN (Senator Fernald). The committee will come to order. Mr. Clark, you may proceed.

STATEMENT OF EDGAR E. CLARK—Continued.

Mr. CLARK. Mr. Chairman, I desire to add with respect to the provision which I discussed this morning only this paragraph 17 of section 15A of the act, which is the so-called rule for rate making, specifically provides that "The provisions of this section"—that is, the entire section—"shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the commission in the public interest under the provisions of this section."

I refer to that as reenforcing the opinion I expressed this morning, that that, with the other qualifications contained in this section, discounts in advance the uncertainties of predictions as to future volume and movement of traffic and earnings, and discounts also the idea that the rate-making rule and the revenue provisions of it contemplate that the shippers shall be required in any instance to pay an unreasonable rate, either individually or as a whole.

SUPREME COURT AFFIRMED POWER OF COMMISSION TO REMOVE UNDUE PREJUDICE AGAINST INTERSTATE SHIPPERS.

Now, the other point upon which I have been asked to say something is the proposed changes in the law conferring jurisdiction upon the Interstate Commerce Commission to remove undue preferences and prejudices and unjust discrimination against interstate commerce or interstate shippers or localities. As Mr. Scandrett pointed out, the original Shreveport case was a very simple, clear-cut, and direct presentation of the question of the right and power of the Interstate Commerce Commission to remove undue prejudice against interstate shippers and localities and commerce caused by State rates prescribed by State authority. I shall not undertake any analysis of that case or of the progress of it and related questions through the courts. We all know that the Supreme Court affirmed the exercise by the Interstate Commerce Commission of that power, and affirmed it in a way that was much broader than the issues of that particular case. The conclusions of law would not have been different if the case had in its origin been very much broader in its scope, but I say I think it is well that it came up on a case narrow in scope and clear-cut in its features, because it rendered possible a clear understand-

ing of the principle without being clouded by all of the intricacies that might be involved in a large rate adjustment.

I notice that in the hearings which you have been holding in the last several days, Mr. Burr, of Florida, testified that in the original Shreveport case the Interstate Commerce Commission did not make a finding as to the reasonableness of the rates. He could not have been more inaccurate in his understanding than he was. And I invoke the decision of the commission, which went on appeal to the courts through the Supreme Court, where it will be found that the Interstate Commerce Commission affirmatively found that the interstate class rates from Shreveport to points in Texas were unreasonable to the extent that they exceed a distance scale prescribed by the Interstate Commerce Commission. Rates not in excess of that distance scale were prescribed for the future, and on that basis the Interstate Commerce Commission ordered the discrimination removed.

I assert that in no case in which the Interstate Commerce Commission has been called upon to exercise that power—and there have been many of them from all sections of the country—has it failed or omitted to find specifically what would be a reasonable maximum interstate rate as a basis for the removal of the discrimination. I presume it is true that in most instances the rate found reasonable by the Interstate Commerce Commission for interstate application, and as a basis for the removal of the discrimination, was somewhat higher than the State rate that was under attack, but that is not always so.

I recall very distinctly that in a case involving rates on fertilizer from Norfolk, Va., into North Carolina, alleged to be unduly prejudicial because of the State rates in North Carolina, the Interstate Commerce Commission took as the measure of the reasonable interstate rates, almost without change, the scale prescribed by the North Carolina commission for application within the State, and it later took that as a basis for determination of reasonable rates in other States in that immediate section, and the general fertilizer adjustment in that section now has as its basis the scale which was prescribed by the North Carolina commission originally, with possible slight variations on account of greater distances, and determined by the Interstate Commerce Commission to be reasonable in the case to which I have referred.

So that all of these statements that have been made here that either affirmatively declare or intimate that the commission has been deciding these cases without consideration of the reasonableness of the rates, both State and interstate, are based in an entire misunderstanding of what has been done—they are inaccurate, erroneous.

DETERMINATION OF REASONABLENESS OF RATES A MATTER OF FLEXIBLE JUDGMENT.

Now, in the discussion, I think it was yesterday or the day before, some expression was made that seemed to doubt the soundness of the statement that both the State and interstate rates might be reasonable and still an undue discrimination exist. I think that statement is accurate, and it is accurate for this reason: Rate making never has been and never will be a matter of exact mathematical determination. A rate may be within the bounds of reasonableness under certain conditions if it escapes the line where confiscation would begin. It may still be reasonable so long as it does not pass the line where undue profits result and unreasonableness of the rate follows. The Supreme Court made that very clear in one of the cases, which I have not the citation on now, but they said in substance that the determination of the reasonableness of the rate is a matter of flexible judgment that goes with the power to fix rates.

And so it might easily be that on a commodity like mill products of grain the difference in the rate, taking Kansas City again, as illustrative, from Kansas City, Mo., and Kansas City, Kans., just opposite each other on the banks of the river, to a point in Kansas, an important market, might not be more than 1 cent a hundred pounds, but that 1 cent a hundred pounds on a carload of 60,000 pounds amounts to $6, and if a man is getting a carload frequently, and many carloads yearly, that $6 a car is going to absolutely determine where he will buy it.

Now, suppose that the interstate rate is 25 cents and the intrastate rate is 24 cents, by what process can anybody determine absolutely that the one is too high or that the other is too low? And still the unjust discrimination against the interstate shipper exists and the undue prejudice is there, and he can not overcome it without some relief.

Reference has been made in this record to the Utah case, one of these State cases, and to the fact that the commission there decided that the rates on

coal and ore should not be increased—State rates. Like all these other cases, it was decided upon the facts, and the facts are these: Salt Lake City is the most desirable and advantageous market for coal in Utah. The Utah coal moves from distances of 125 to 150 miles into Salt Lake City under rates fixed by the Utah commission. The Union Pacific people, desiring to put the operators at Rock Springs, Wyo., on the line of the Union Pacific Railroad, into the Salt Lake market, made the same rate from Rock Springs to Salt Lake that the Utah commission had prescribed from the Utah field—Sunnyside—to Salt Lake City. The Utah commission had prescribed a liberal rate for the haul within Utah. The Union Pacific could not increase its rates from Rock Springs to Salt Lake City and keep its operators on a parity with the operators in the Utah field unless they brought the Utah rates up so that they could increase the Rock Springs rate, and on account of the measure of the rate that the commission had fixed in Utah from Sunnyside, as a liberal rate for the distance, we said "No; there is no occasion; this rate does not discriminate against interstate commerce which moves anything like the same distance and under similar transportation conditions." I refer to that only as illustrative of the fact that all of these cases were decided on their respective merits.

NO DECISIONS WITHOUT ACCORDING FULL HEARING.

And before I forget it, I want to say with emphasis, Mr. Chairman, that any insinuation that the Interstate Commerce Commission has decided any one of these State cases without according a full hearing to the people who wanted to be heard is very far from the fact. In every instance the Interstate Commerce Commission held hearings they held them wherever it was most convenient for the people who were interested and heard everybody that wanted to be heard. It decided these questions on the facts as they were developed of record, and I invite consideration of the decisions of the commission, and I am sure that nobody will impute to the Interstate Commerce Commission the idea that it has purposely falsified its reports, because its reports are based on the records and the records are public documents; they are there for anybody to see that wants them. In every one of these cases specific instances and numerous instances generally were cited, and undisputed, as to the prejudicial effect of the increase in the interstate rates upon interstate shippers and travelers without a corresponding increase in the State rates.

I want to correct another impression that seems to have been gleaned from what has been said here, that the Interstate Commerce Commission has held that a mere difference between the State and the interstate rates constitutes undue prejudice or undue discrimination. The commission never held that in any case. In every one of these cases the Interstate Commerce Commission has held that under the powers vested in it, under the duties laid upon it by the transportation act, it had authorized certain increases in the interstate rates, and that the failure to make corresponding increases in the State rates constituted and created and perpetuated the unjust discrimination and the undue prejudice.

Now, if the interstate rate was increased 35 per cent and the State rate was increased 35 per cent, whatever difference there was between those two rates in the start, is there yet, is there to-day. The commission never has thought of taking the position that a mere difference in the rates constituted unjust discrimination.

This question of the doctrine of the Shreveport case has been brought before the Interstate Commerce Commission, as I said a few minutes ago, from many localities. In many instances. Strikingly illustrative instances—only a few, but they outline the situation—are these: Omaha and Council Bluffs have for many years been included by the railroads in a common rate district, as if they were one town. Naturally, as Mr. Scandrett pointed out this morning, a change in the State rates which gave Omaha a decided advantage over Council Bluffs, disrupted that arrangement, and it was objected to by Council Bluffs, and even by people in Omaha. That situation was brought before the Interstate Commerce Commission in the Missouri River Cities case to which Mr. Scandrett referred. We have had complaint involving the rates from Kansas City, Mo., into Kansas as compared with the rates prescribed by the State of Kansas from Kansas City, Kans. We have had complaints from St. Louis, Mo., against the evil and injurious effect upon St. Louis and its commerce of the intrastate rates prescribed by Illinois. We have had complaints

from East St. Louis, just across the river, against the undue prejudice East St. Louis experienced because of actions of the State commission in Missouri. St. Louis and East St. Louis have for many years been included in one rate group. To and from distances beyond 100 miles from East St. Louis the rates to and from St. Louis and East St. Louis are the same.

Now, in several of these cases the State commissions have appeared as complainant for the localities. I mean, these cases that were brought before the Interstate Commerce Commission before the transportation act was passed, and they have appeared in those cases as counsel and advocates for or against the proposition, depending on which side of the line their jurisdiction lay.

It is a little difficult to take up this record, so far as it has been made up, in a careful, analytical and connected way, because the complaints which have been voiced here seem to one who reads the record to be sort of a checkerboard of allegations that the Interstate Commerce Commission has misconstrued the law that it has exceeded its authority under the law, representations of what the carriers have contended the law means, and representations of what the carriers seem disposed to insist upon.

NO VALID REASON FOR ATTACKING ACT.

Now, I submit that this law is not open to attack before a tribunal like this on the ground that somebody outside of those charged with the administration of the act has contended that it means a certain thing, or has asserted the intention to contend that it means something. If that were a valid reason for attacking this law, it would apply with equal force to every law on the statute books, because I do not know of any law as to which it is not easily possible to find those who will advocate either side as to what it means.

This law is to be tested by, first, I think, the purposes aimed at and the reasons for enacting it; and, second, by the question of whether or not it has accomplished that which it was intended to accomplish. Even if for argument's sake it were to be admitted that the Interstate Commerce Commission has in some particular misinterpreted the act or misconstrued its powers, the law provides a means by which the Interstate Commerce Commission can be set right. That means has been invoked, and the question of whether or not the Interstate Commerce Commission has exceeded its powers and misinterpreted the act is now before the Supreme Court of the United States.

If what is here advocated were to be adopted by the Congress, and this law were to be changed in any substantial particular, those questions which have been litigated through the Supreme Court of the United States, and that are now before the Supreme Court for determination, would become moot questions and we could begin over again with the same kind of controversies as to what the law, as amended, means.

Several years ago it was contended by some that the act to regulate commerce gave a complainant the right to go into the court or to the commission, as he might choose, for redress of his grievance, but that he could not invoke both jurisdictions. That was undertaken in a concrete case which went to the Supreme Court of the United States.

In its decision on that case, which was entitled, I think, Texas & Pacific Railway Co. *v.* Abilene Cotton Oil Co.—at any rate it is reported in 204 U. S., 339—the Supreme Court very clearly and carefully pointed out that the fundamental purpose of the act to regulate commerce was uniformity; that if concurrent jurisdiction, original jurisdiction of these controversies, resided in the courts and in the Interstate Commerce Commission, the inevitable result would be differences of view as between courts in different jurisdictions on substantially similar sets of facts, and that uniformity which is the fundamental basis of the law would be destroyed. And it held that on those questions which involved the necessity of a finding as to the reasonableness of the rate, or as to whether or not undue preference or prejudice or unjust discrimination existed, a decision by the commission was a necessary precedent to any action by the courts.

In later decisions the Supreme Court pointed out with equal clearness and very carefully the extent to which the courts might review the decisions of the Interstate Commerce Commission, and for substantially those same reasons the Supreme Court said that the decision of the Interstate Commerce Commission must be based on evidence on record before it, and that the courts might not substitute their judgment for the judgment of the commission as to the effect to be given to that evidence; that if the Interstate Commerce

Commission's decision was supported by evidence in the record it could not be changed, because the court would have reached a somewhat different decision on the same set of facts, thereby destroying uniformity.

FORTY-EIGHT STATES CAN NEVER BE OF ONE MIND AT SAME TIME.

Now, if the Congress is to repeal not only whatever of added jurisdiction it gave to the Interstate Commerce Commission in the transportation act, but all of the jurisdiction which the Interstate Commerce Commission exercised, and which the Supreme Court of the United States supported in the Shreveport doctrine, it seems to me that it inevitably follows that there will be 48 States, each with supreme and final jurisdiction on the rates, regulations, and practices within its borders, and a certainty that they never will be of one mind at the same time.

When the Interstate Commerce Commission decided this Ex parte 74, which was the case involving the increases in rates following Federal control, it invited three representatives of the State commissions to sit with it, and, as I said this morning, they did sit with it and acquiesced in the decision. The Interstate Commerce Commission at that time had 10 members. Five of the ten were either members of State commissions when they were appointed Interstate Commerce Commissioners, or had been members of State commissions very shortly prior thereto. So that of the 13 who acquiesced in the decision of that case 8 were State commissioners or those who had come from State commissions immediately preceding their appointment as Interstate Commerce Commissioners.

Now, the three State commissioners who sat with the Interstate Commerce Commission made a statement and gave it general distribution among State commissions, announcing their views in the matter and giving advice probably as far as they were justified in giving it, but it did not result in a unanimity of opinion among the several State commissions. It is true that in a number of these cases the State commissions were powerless to act because they had no jurisdiction under their State statutes. In other cases they had full jurisdiction and full power and declined to act.

It happened that shortly before that time the State of Indiana, through its commission, had brought a proceeding before the Interstate Commerce Commission complaining of undue prejudice against Indiana shippers and localities because of the rates maintained in Illinois by order of the Illinois commission. That was very bitterly contested, and several hearings were had and different angles of it were brought before the commission in an effort to iron out those differences and find a common level that would be right and fair, but when it came to a determination of the carrier's application in Indiana for authority to make the same increases that they had made under the Interstate Commerce Commission's order the commission of Indiana very clearly disclosed that it refrained from doing that in full because the State of Illinois had not done it, and the Indiana commission would not subject the Indiana people to a disadvantage that they would be under if the Indiana commission would go the full length while Illinois had not.

Now, it seems to me beyond room for argument or doubt, that if we are to avoid a chaotic, intolerable condition of rivalries between States, and growing out of honest differences of opinion between State commissions, there must be vested somewhere authority to settle those controversies when they do arise. That authority has been in the Interstate Commerce Commission ever since the act of 1906 was passed, but it is now proposed to take it away, to wipe out all of the law on that subject, including that laid down by the Supreme Court of the United States, and go back to a condition where, as I have said, nothing can be more certain than that these differences will exist.

How can it be thought that the people of a State desirous of being broad and liberal and fair, represented by a commission that has the same impulses and desires, will long rest under a level of rates produced by order of that commission in that spirit when they look around on the four borders of their State and find that in the neighboring States the people are getting lower rates? Inevitably the higher rates would come down, and it will be a grading down to the lowest peg that might be set by some particular commission.

NO THOUGHT OF INTERSTATE COMMISSION DISPOSSESSING STATE COMMISSIONS.

Now, I want to deny that the Interstate Commerce Commission has ever acted with any thought or desire of extending its jurisdiction, or of dispossessing the State commissions from any of their jurisdictions. The Interstate Com-

merce Commission has work enough without seeking any more, and for that reason alone it would not go out of its way to seek more jurisdiction and more power and more work, but aside from that it has had no such disposition.

This transportation act incorporated a specific authority of law for the Interstate Commerce Commission to cooperate with State commissions. Where did that originate? The origin of it is found in the annual report of the Interstate Commerce Commission to the Congress where it recommended that very thing. As I have said twice, it followed up that idea by inviting the State commissions to sit with it in this biggest and most important rate case that was ever tried before any tribunal in the civilized world. Now, why is the Interstate Commerce Commission accused of being unwilling or undisposed to cooperate with the State commissions?

Mr. Benton has taken the pains to put in the record here some correspondence which passed between himself, representing the State commissions, and myself, happening at the time to be chairman of the Interstate Commerce Commission. And I entertain no doubt he has put it in correctly.

Attention was called in that connection to the fact that a substantial period of time elapsed between the next to their last communication to the commission and its reply.

Now, stripped of everything but the essence, what the State commissions requested the Interstate Commerce Commission to do was at that time while this law was new, had not been subjected to any experiences, to lay down a formula which should govern cooperation between the State commissions and the Interstate Commerce Commission, lay down the scope of the extent to which the commission would turn over to the State commissions jurisdiction of the question of exercising the emergency powers given to the commission with regard to physical operation.

Senator POINDEXTER. It seems to me that either you or some other member of the Interstate Commerce Commission during the hearings on that transportation act rather argued in favor of preserving the activities of the State commissions.

Mr. CLARK. I did, sir; and the Interstate Commerce Commission has expressed itself in the same way, and the individual members of it have expressed themselves in the same way. Never have had any different thought. The commission was unwilling, in the absence of experience, with no precedents to guide it in regard to this question of cooperation, to attempt in advance to bind itself to any set of regulations which would be sent to all of the State commissions, to be sent to the public everywhere, and until changed by the commission would be, of course, binding upon it. It did not know just what circumstances and conditions might arise where this cooperation would be most desirable and most helpful. It did not know what circumstances and conditions might arise where it would be undesirable. It was unwilling to abrogate right off the bat any of the powers which the Congress had seen fit, after so careful an analysis of this new law, to vest in the commission. It was desirous of cooperating wherever that could properly be done. Some members of the Interstate Commerce Commission felt that it would be inappropriate for the Interstate Commerce Commission to cooperate in a joint hearing with a State commission where the question before the commission was an order of that State commission in force and at issue, and that it would be inconsistent for them to sit in judgment on the appeal from their own action.

Now, the delay that was adverted to grew out of only two facts: Primarily, because the question was of such importance that we desired to have it considered by all of the commissioners, some of whom were absent; and, secondarily, because of the time that necessarily elapsed between conferences of the commission at which the matter could be considered and the differences of view and the many angles of the situation worked out.

COMMISSION NOT SWAYED BY POPULAR CLAMOR.

The commission always has been, and I guess always will be, the subject of a great deal of misunderstanding and a good deal of criticism, much of which, at least, is unwarranted and unjust; but inasmuch as I am no longer a member of it I think I can with propriety point to the record that the Interstate Commerce Commission has made, the standing that it has gotten even before these railroads that used to think it was guilty of all the crimes in the decalogue—and the shipping public—and I assert that the reason that the Interstate Com-

merce Commission has attained that reputation and that standing is because it has stood with a face to every wind that blows and performed its duties in accord with its conscientious convictions of what was the right thing to do, and has not been swayed by popular clamor, by any political influences or anything of that kind; and if the time ever comes when the Interstate Commerce Commission has to consider whether or not a thing is going to be popular and whether or not it is going to be attacked by one political party or another, its usefulness will be very seriously impaired, in my judgment.

There are many things, Mr. Chairman, in this record that I might find some satisfaction in dealing with, but they are of minor importance. I want to deal with the thing in the same spirit in which the Congress dealt with it. It is a great big question. It ought to be dealt with in a broad way, in a frame of mind that can brush aside little misunderstandings or trivial things—inadvertent expressions, or anything of that kind.

There are a few of the high points that I have not touched, that I do want to touch upon. I want to say, first, that Mr. Benton has entirely misconceived the purposes and the view of the Interstate Commerce Commission when it exercised, in connection with its orders in these State cases, the power conferred upon it to require that its order shall remain in effect until the further order of the commission.

As is well known, the Congress in the old act to regulate commerce, acceded to the desires of the carriers, and provided that the order of the Interstate Commerce Commission should continue in effect for a period not to exceed two years. It developed that in some instances the cases were litigated before the courts, and the two years were practically consumed before the litigation terminated. And in other cases experience has demonstrated that it was not desirable to have that limitation upon the orders of the Interstate Commerce Commission, especially where the commission fixed a relationship as between the rates on certain commodities, or as affecting certain localities, which relationship did not affect the level or measure of the rates. And so the commission recommended that the Congress should give it authority to make its orders run until the further order of the commission, having in mind that the law specifically authorized the commission at any time for good cause and on proper showing to amend, modify, or strike off its order.

We thought when we adopted that policy with regard to these orders that it would be less objectionable in the eyes of those who were opposed to the exercise of that power if we made it run till the further order of the commission, with that power to strike it off at any time, than it would if we put it in for a period of two years, which would imply that we intended that it should continue for at least two years, and the whole disposition of the Interstate Commerce Commission, freely talked among ourselves, and I think it was talked with others—I know it was explained to some others in conversation by myself—was that if we could effect in some way, either by cooperation with the State commissions or by change in their views, an adjustment that would remove the undue prejudice that our order was aimed at, we would strike that order off and leave that commission in full jurisdiction over those rates, just as if the order had never been made.

It is perhaps not of great importance here, but I confess it was interesting to me. I notice that Mr. Benton expresses the view, and I agree with him absolutely, that under the transportation act neither the carriers nor a State commission, nor anybody else, could reduce a rate that was in effect when Federal control terminated, during the guaranty period, without the approval of the Interstate Commerce Commission. It was obviously a necessary protection which the Congress adopted, of the Federal Treasury, which was standing good for the guaranty. And I want to read three or four lines from a decision rendered October 26, 1921, by one of the State commissions. It is a very progressive State commission, too, a very broad one. A complaint was before that commission praying for reparation on shipments that moved under an alleged unreasonable intrastate rate during the period of Federal control, and during the guaranty period, and since. The carriers pleaded that that commission was powerless to reduce that rate without the authority of the Interstate Commerce Commission, prior to the termination of the guaranty period. The State commission in its report said that that contention was without merit, and said:

"It was not intended that rates should remain fixed and beyond change throughout the guaranty period, and we think the return of the roads operat-

ing in this State on March 1, 1920, to private control, subjected their intrastate rates again to the inquisitorial and regulatory power of this commission."

IMPOSSIBILITY OF UNIFORMITY UNLESS POWER SOMEWHERE TO REQUIRE IT.

I refer to that not in any spirit of criticism, Mr. Chairman, but it is an evidence of the differences of view that are taken by these different bodies and the impossibility of having uniformity unless there is some power somewhere to require uniformity between diverse opinions.

Mr. THOM. Mr. Chairman, I have, unfortunately, got to go, but I would like to ask you if you would permit me to suggest to the witness this one matter: Whether or not it was not a uniform practice of the Interstate Commerce Commission in its orders in these State cases to reserve the right to inquire again into all individual situations that anybody might complain of?

Mr. CLARK. I had that in mind, Mr. Thom. It not only did that, it, as I see it, went a good deal further than to reserve that right. The commission realized that it was necessary to deal with these matters in somewhat the same general, broad way in which they came up. As I said this morning, when it came before the Interstate Commerce Commission in Ex parte 74 everybody conceded that it had to be done in a rather summary manner and without meticulous inquiry into every particular rate. In the State cases they came before us on petition generally of the carriers, investigation was instituted on the petition, and the hearing was had. Everybody that wanted to be heard was heard. Numerous instances of discrimination against places and localities and individuals were spread of record.

But the commission realized that there might be somewhere in the State, unknown to it, a little railroad perhaps that conducted a purely intrastate business and that had no direct connection with any interstate business. There might be a situation regarding certain towns where there was absolutely no relationship with interstate business over a carrier connecting those two towns within the State, and so we incorporated in every one of those orders a provision that these findings—I am not quoting it accurately, but this is substantially the wording—that these findings shall not be understood to prejudice the right of the State authorities or of any person at interest to ask for a reconsideration and a reexamination with regard to any rate on the ground that it is not directly connected with or affects interstate commerce.

Senator FERNALD (presiding). Col. Thom, I think you understand about the meeting Tuesday?

Mr. THOM. At 10 o'clock; yes. Mr. Wood will be back here to complete his testimony, and I am going to tell all my other witnesses not to come.

Senator FERNALD (presiding). And when Mr. Clark concludes his testimony, that will be the end for the day. We will not continue after that.

Mr. CLARK. Well. I shall conclude, Mr. Chairman, in a few minutes. I have used more time than I originally intended to, and I do not want to unduly extend it.

I wanted to add a word to what I said with regard to the effect of adopting the amendments that are here advocated with regard to repealing the Shreveport doctrine and all of the law that is based upon it, and as supplementing what I said with regard to the decisions of the Supreme Court as to the jurisdiction of the commission as compared with the jurisdiction of the courts. On page 193 of this record, as printed, after Mr. Benton had made quite an explanation of his views, the chairman of the committee said:

"The CHAIRMAN. I assume that is for the purpose of enabling a review?

"Mr. BENTON. Yes.

"The CHAIRMAN. And those interested may have a review of the order of the commission, so that a court could determine whether the facts found by the commission sustained the order that was issued.

"Mr. BENTON. That is the purpose of it, Mr. Chairman."

I want to point out again, Mr. Chairman, that if we ever get to that point you have got a situation where every district court in the United States will be a regulator of interstate commerce, and if any uniformity can be hoped for, I don't know where it will come from.

Now, that is not criticism of the courts. They have their jurisdictions, they have their convictions, and they voice them, but we have machinery by which they can all be brought to the final tribunal, the Supreme Court of the United States, and the proposition here is that we shall have no such Supreme Court in transportation.

Considerable reference was made in here to this West Virginia Electric case, and a good deal of emphasis was laid upon the decision of the Supreme Court of the United States in the Omaha case. That is one of the very few cases in which the Supreme Court has, for a considerable number of years, reversed the decision of the Interstate Commerce Commission. It reversed the decision in that case purely upon the question of jurisdiction, as to whether or not the act had conferred upon the commission jurisdiction of that electric railroad. It declined to give any consideration to an amendment to the act which had been passed after the record in that case was made up, and under which the Interstate Commerce Commission has ever since that time been exercising the jurisdiction that it asserted in the Omaha case but which the Supreme Court of the United States reversed, and it has not been challenged in any other courts in any other case since that time, so I don't think the Omaha case decides much except what the law was at the time that record was made up. Not what it is to-day.

Some criticism was made about the Interstate Commerce Commission asserting that it had no jurisdiction of reasonableness of intrastate rates after it had, as the expression is made, frozen the rates. Now, that is in direct connection with the answer I made to the question raised by Mr. Thom. There may be a rate somewhere in that State that has been increased. It may be that it has no relation to interstate commerce. If it was brought to the attention of the commission, and it was found that it had no relationship to interstate commerce, effected no unjust discrimination or undue prejudice, the commission certainly would take its hands off of it in a minute. It has said that it has no jurisdiction to determine the reasonableness per se of a purely intrastate rate, except when that question of reasonableness is coupled with the question of undue prejudice or preference as between State and interstate commerce.

A good many of the troubles that were referred to here by some of those who appeared before the commission in these State cases had their basis in the fact that in connection with or entirely independent from any action taken by the Interstate Commerce Commission the courts had issued injunction orders restraining the State commissions and necessarily putting the situation in a more delicate position to be dealt with by the commission than it would be if it were not for the action of the courts.

TRANSPORTATION ACT A BIG CONSTRUCTIVE PIECE OF LEGISLATION.

Now, I think, Mr. Chairman, that I shall bring my remarks to a close by repeating in substance what I said this morning. This act is a great big constructive piece of legislation, enacted by the Congress in the broadest frame of mind and a desire to be helpful. In so far as it has had an opportunity to be tested it has been helpful. It has done nobody any real harm, and all of the danger that lurks in it or all of the danger that is feared from it is apprehension as to what somebody may say some time.

The transportation act is right. It is sound legislation. It is entitled to a fair trial and to be determined to be bad law by actual practice and demonstration rather than by interpretation of what may happen under it or what somebody may say with regard to it by those who were opposed to it from the start and opposed to any of the principles that underlie it.

Now, if this act is right it should be adhered to and given a fair trial. If it is or has been misinterpreted or misconstrued the law affords a remedy, and that remedy has, as I have already said, been invoked, and the questions are now before the Supreme Court of the United States.

The history of the attempts of the United States Government to regulate the railroads through an administrative tribunal carrying out the decrees of Congress has been marked from its conception up until a comparatively recent time with a great volume of litigation, litigation in the main between the carriers and the Interstate Commerce Commission. In recent years there has been comparatively little of that. I think there will be a lot of it in connection with the valuation work, but I am referring now to the rate work of the commission. We are having some litigation about this very question that I have just been discussing.

There was no unanimity of opinion with regard to the powers of the Interstate Commerce Commission under the Shreveport doctrine until the Supreme Court of the United States spoke, and since that time there has been no controversy as to that; and Mr. Benton, when he comes down to draw his own proposed amendments here, seems disposed to preserve that, except that he

attaches some provisos to it that Mr. Scandrett, I think, pointed out this morning very effectively render it impossible of administration.

Now we have got this question up to the Supreme Court of the United States. We are liable to hear from it at most any time. If the Interstate Commerce Commission has been wrong it will certainly hasten to right itself. Whatever it may have misinterpreted of this law, if at all, will be set right and everybody will know what the law is, and then we can have a fair test of it.

Senator POINDEXTER. What case is up in the Supreme Court, Mr. Clark?

Mr. CLARK. The Wisconsin case and the New York case, Senator, are in the Supreme Court.

Senator POINDEXTER. Involving what question?

Mr. CLARK. The power of the Interstate Commerce Commission to exercise the powers which it asserted and the orders which it did enter in these State cases. Both of those cases involved only the passenger fares.

And that leads me, Senator, to inject this suggestion, that I do not find it in this record in all the discussion that is made of the New York case, but the records before the Interstate Commerce Commission will show that while the New York State commission asserted that it had the power to readjust those intrastate passenger fares, the State of New York, through its assistant attorney general, was insisting that the State commission had no such power. There are so many angles in all these things that it is not surprising that people do not understand them all. The thing that surprises me is that there are so many people ready to talk about them with all the assurance that they do talk, when they do not understand all of the facts.

Mr. WARFIELD. Mr. Clark, have you finished your statement?

Mr. CLARK. Yes.

Mr. WARFIELD. My understanding is that when the committee adjourns it will be until Tuesday?

Senator FERNALD (presiding). Yes.

Mr. WARFIELD. And do I understand, then, that the security owners will continue?

Senator FERNALD (presiding). I think Mr. Wood is expected back, Mr. Warfield, to go on the stand first Tuesday morning.

Mr. JOHNSTON. Mr. Thom just mentioned to me the fact that he had suggested that Mr. Wood return. We were to follow, my original understanding was, and take about three hours for the security holders and Mr. Thom suggested that after Mr. Wood got back, if it would seem that his engagements were imperative, that we would take it up then and consider it. Is it known now what witnesses will be heard on Tuesday?

Senator FERNALD (presiding). Well, I don't know anything further than Tuesday morning. I have not been able to see Senator Cummins. I was just advised that we would go on Tuesday, but I doubt very much if anything will be done after Tuesday.

Mr. JOHNSTON. Will the hearings be only on Tuesday morning, or will you also have a hearing on Tuesday afternoon?

Senator FERNALD (presiding). Tuesday forenoon, and possibly afternoon.

Senator POINDEXTER. We might set the hearing for this room instead of the other building. We thus could proceed on here until probably 1 o'clock, and I think have an afternoon session.

Senator FERNALD (presiding). We could have a hearing without doubt, all day Tuesday.

Mr. WARFIELD. If you do not mind I would like to give my interpretation of what was the understanding between the Security Owners' Association and the counsel of Railway Executives' Association.

Senator FERNALD (presiding). Yes.

Mr. WARFIELD. My understanding was that we were set earlier for a hearing than the Association of Executives. Then the understanding was that they were going to put on two of their witnesses; then they would give way to us; and then they would bring four or five witnesses back after we were through. Now, if we could continue the continuity of our testimony on Tuesday, we would very much like to do it. My understanding of the arrangement is as I have given it.

Senator FERNALD (presiding). I think it is only fair, then, to say to Mr. Warfield that you may go on, so far as I now know and can say. I did not know of the arrangement between you.

(A statement was made to the committee that Mr. Wood was coming back at great inconvenience, and it would be difficult for him to return at a later date.)

Senator FERNALD (presiding). I think, Mr. Warfield, that it would be very proper to hear Mr. Wood if he is here that morning; and if he is not, to go on with your witnesses.

Mr. Clark, I want to express the regret that there are so few members of the committee present to listen to you. We realize that you are perhaps the best informed and most fully equipped witness that can appear before this committee, and the committee feels that way, and it is a very great loss to them not to have heard you, although they will read your testimony, I am sure, very carefully, but it is just impossible to get many more here than we have had to-day at our meetings.

Mr. CLARK. You are very complimentary, Mr. Chairman, and I appreciate the patience with which you have listened to me.

(Whereupon, at 3.12 p. m., an adjournment was taken until 10 o'clock a. m. Tuesday, November 22, 1921.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

FRIDAY, NOVEMBER 18, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 9.30 a. m., in room 410, Senate Office Building, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. Mr. Fisher, you may proceed. State your name, position, and relation to the subject.

STATEMENT OF HON. WALTER L. FISHER, OF COUNSEL FOR THE NATIONAL ASSOCIATION OF OWNERS OF RAILWAY SECURITIES.

Mr. FISHER. Mr. Chairman and gentlemen, my name is Walter L. Fisher, and my residence is Chicago. I am appearing as of counsel for the National Association of Owners of Railway Securities in this particular matter.

I think, perhaps, I should state that some months ago on behalf of the Chicago Railway Terminal Commission and as an individual citizen I appeared before this same committee to discuss constructive measures with reference to railroad legislation that were then under general inquiry, and made a statement, which appears in the printed record of the proceedings under Senate resolution 23, at page 970 and following.

At that time I undertook to discuss what seemed to me are some of the fundamental propositions involved in any constructive program with respect to the transportation system of this country. In the course of that statement I had occasion to refer to the transportation act and also to the National Association of Owners of Railway Securities. I stated then in substance that I thought the most hopeful thing that had occurred in the railroad situation in recent years was the organization and appearance of the National Association of Owners of Railway Securities. I also referred to the transportation act as being the most constructive legislation that had recently been enacted by the Congress. I believed then, and I still believe, that that act should go forward along the general lines that it indicated; that the criticism of it, if there was criticism of it, was that it had not gone as far as it should have gone. And I believe that the chairman of this committee expressed on the record his own views as to that, particularly with reference to the provisions for consolidation or coordination of the railroads of the United States for the purpose of eliminating needless duplication and waste and increasing both the efficiency and the economy of operation.

It is, therefore, with a great deal of disappointment and apprehension that I find the present attack upon the transportation act taking the form of an effort to set back the clock, to reverse the constructive measures or steps which the Congress than took. I do not believe that anyone has ever had a clearer view of the difficulties of the situation which had existed prior to the passage of the transportation act than the chairman of this committee or that anyone has expressed or defined that situation any more clearly. The truth is that your declarations, Mr. Chairman, have become more or less the gospel which I find is quoted on numerous occasions by those who are students of the transportation problem.

THE "INHERENT FUNDAMENTAL DIFFICULTY" IN RATE MAKING.

When Prof. Ripley, who is an eminent authority upon the general theory of railroad transportation, was called upon to present a tentative scheme to the Interstate Commerce Commission for the consolidation of the railroads, he

quoted the chairman of this committee as summarizing the situation. I read from his report to the Interstate Commerce Commission, as follows:

"The difficulty in the past, as stated by Senator Cummins on December 2, 1919, in the Congress, is that——"

And I now follow with the quotation that he gave from Senator Cummins's statement:

"It has been utterly impossible for any body of men to make a system of rates that will sustain the weaker railroads of the country without giving to the stronger railroads an income excessive and intolerable in its extent, and there lies the great fundamental obstacle in our system of rate making. It was obvious, I think, to the students of the subject long before the Government took possession that we must adopt some plan that would remove this inherent fundamental difficulty."

My interest in the transportation act was because of the fact that it did offer a way out of that difficulty. As a member of the Federal Railway Securities Commission, appointed by President Taft in 1910, I believe it was, the commission of which President Hadley of Yale was chairman, I had had occasion to study, together with the other members of that commission, the whole broad field of railroad finance. We had before us, I think, the most of the men in this country who had had to do with that subject—railroad executives, railroad financiers, general students of the problem, members of the Interstate Commerce Commission, and other officials both State and Federal. We held prolonged hearings in this country at different cities, and we secured from abroad, both from England from the Continent of Europe, a very great mass of information which was especially collected for us, some of it by the personal work of the commission in Europe and other information obtained in other ways.

Now, gentlemen of the committee, I think it is only referring to an open secret to say that the members of the Interstate Commerce Commission at that time, as in every conversation or conference I have had with any of them since, stated that although there were various elements which had been indicated by the courts or worked out by economists showing what should be the standard or measure of rate making, that after all the subject was involved in an impenetrable fog because of the inherent difficulties, and because, as I see it, of the failure to recognize the principle for which I contended in my previous appearance before this committee, the refusal or failure to recognize the fact that a railroad is an arm and instrument of government.

Every time that is not kept in mind as the necessary preliminary to determining what should be the right solution of the railroad problem the result is necessarily wrong, or if it is right it is merely by accident. That is true from the point of view of the executives, that is true from the point of view of the public, that is true from the point of view of the investor. It results in a vicious circle to discuss the question of railroad values and railroad rates under a system of private ownership and public regulation unless it is recognized that what you are attempting to do is to apply to the circumstance of private ownership the principles that would govern if the Government itself was directly operating the roads.

Now, what happened under the old system? It is true the commission said that in making rates you took into account a fair return upon the value of the property used and useful in the transportation service. It is true that they said reproduction cost less depreciation was one of the elements; that the outstanding securities were also to be considered, and a variety of items which have been mentioned in the decisions of courts and commissions. But the truth of the matter is unless you adopt the principle laid down for the first time in the transportation act you get nowhere. And why? Because in the end the commission, having considered all these various elements, abandons all hope of a scientific solution and jumps to a conclusion. It can not do anything else.

The chairman of the committee said here on yesterday, as I recall it, in connection with the testimony of Mr. Scandrett, that the witness was not directing his remarks at the time to what seemed to be the fundamental basis of the objections to this act, and the chairman said that, as he understood it, the objectors were really attacking the whole theory of making rates based upon any grouping the railroads. I think that is true. That is what they are attacking. I have listened to a considerable part of the testimony and I have read such parts as have been printed, and I have thus far failed to find—it may be there, but I have failed to find it if it is—any attack upon the proposition that 5½ per cent in itself is a proper rate. There have been suggestions by innuendo or indirection that the result was too high. The concrete objection made by Mr.

Thorne, however, promptly resolved itself into an attack upon the valuation and not upon the rate. I am not here defending the present valuation or proposing any particular valuation. I am defending the general principle of the transportation act—that there shall be a fair valuation and a fair return upon that valuation.

COMPETITION IN RATES PRACTICALLY IMPOSSIBLE.

Now, gentlemen of the committee, if we may assume that the chairman of this honorable committee has diagnosed the attack correctly—and I think he has—what is it that the objectors present as an alternative—I mean as a basis for rate making? Anything? If it is wrong to make rates based on groups of railroads, as the act provides, then are we to go to rate making upon the individual railroad? Is it conceivable that such a thing as that is practically possible? During all the past 10 years or more that that subject has been so acutely under discussion, if there is anything that has been settled it has been that competition in rates is practically impossible. I do not mean that there are not incidental competitions—there are—but they are accidental and altogether by the way. The truth of the matter is that you can not have, broadly speaking, competition in rates, and you can not base railroad rates upon the valuation or upon any other theory applicable to a single railroad. It will not last. It results in the old system of rate cutting and demoralization, in which, necessarily, the weaker railroad systems are compelled to cut rates in order to get any traffic, and finally none of the railroads are getting a return which gives them any basis of credit or enables them to continue in operation. That is pointed out by Prof. Ripley in this same report to the commission, in passing, as axiom.

Suppose we were to undertake the only alternative to take group railroad rate making. Suppose A B C railroad is a line between certain points; that it is a soundly located railroad; that it is a situation in which there should be a railroad; and look at it as a separate proposition, as though it were the only railroad in the United States. Suppose we were starting to build railroads, and the question was whether a railroad ought to be built between those particular points, and it was located after the matter was looked into either by those who wished to promote the construction or the public who wished to have it constructed, and they had said: Here is the place for a railroad. It is true that it is not the most profitable location for a railroad; there is not the largest volume of traffic between those points, but there is a volume of traffic, existing or potential, which calls for the construction of the railroad, and that railroad is built. And let us say that it is economically and honestly built, and it starts to operate, and the Government undertakes to regulate it—fix its rates. Would there be any question on earth but that that railroad would have to earn its operating expenses and such return upon the actual investment as would enable it to pay interest upon its bonds and provide to its stockholders at least that return which is necessary to induce anybody to engage in such an enterprise?

Surely that represents the minimum to which regulation must be addressed.

Now, let us assume that X Y Z railroad came along next and is built between other points which produce more traffic, which have a larger volume of traffic, and which railroad is therefore more profitable. And the regulatory authorities undertake to regulate the X Y Z railroad, and they regulate it, and they apply the same principle that is applied to the A B C railroad. The result must necessarily be different. The result in the case of the latter railroad would be to fix rates at a lower level than in the former case, and yet both of them would be based upon the minimum essentials.

If those two railroads happen to be in competition between certain points what would happen? The very fact of regulating down the rates of the X Y Z railroad would be to take all of the competitive business away from the A B C railroad, its competitor, because shippers would naturally ship via the railroad having the lower rates. The result would be that the A B C railroad, although confessedly on principle entitled to a higher rate, would either have to have its rates correspondingly increased so as to get a fundamental return out of the noncompetitive traffic and as much of the competitive traffic as it could by hook or crook hang on to, or the A B C railroad would have to go out of business. And for no reason of its own. We will assume that the investment has been absolutely honest and the railroad efficiently operated. That is the result which has happened everywhere.

This is A B C or kindergarten stuff, and yet as the chairman said here yesterday, that is the real thing which is under attack here. It is an attack upon the proposition of making rates on groups or combinations of railroads. That is the attack made.

Now, why is the attack made? I think it is not necessary to impute any motives, the situation is so obvious. In the muddied waters that are created by this rate-making controversy under the old conditions before the transportation act it is the thought that they are more likely to get rates down. The more confusion the less certain that the railroads will be given that minimum return upon which they must depend.

If we turn to the courts for the correct theory of railroading, and I have cited at the previous hearing numerous decisions of the courts of the United States from the Supreme Court down on this subject, if it is the correct theory that railroads, after all, are as the Supreme Court said in so many words, performing a function of government, what would be the situation if the Government owned these two railroads, or any other combination of railroads, such as that to which I have referred? Why, necessarily there would be a level of rates which would be intermediate between the lower road and the higher road, the more advantageously located and the less advantageously located railroad, or having established a level of rates which approximated a fair return upon both of them, if those rates produced a higher revenue upon the more advantageously located road than was necessary to support that road the Government would use that higher revenue to help out the road less advantageously located. That would be the system which you or any governmental body would put into effect the next day after the Government had taken over the railroads and was operating them as a governmental function.

The truth of the matter is that to go back to the old system, which would result from the adoption of the Capper bill or the amendments which have been offered on the floor of the Senate to the funding bill, to go back to the old system would be merely to throw the whole thing into hopeless confusion. As the chairman of this committee has said, we must adopt some plan that will remove the "inherent fundamental difficulty."

We have got to get rid of the whole notion that there is any place in railroading for competition in the sense in which the word is applied to industrial or commercial enterprises of a nongovernmental character. Our problem is how to preserve enough of the competitive element to stimulate initiative and economy and efficiency. When we get beyond that and talk about competition that reflects itself purely in financial profit we get inevitably into difficulty. It will not work. It has never worked in the past and will not work in the future. So long as railroad regulation was regulation downward, so long as the railroads in the country as a whole were making a return which was thought by the public to be excessive and the question was whether or not those rates that produced that return could be reduced, everything was all right, because you were dealing with a theoretical or an actual surplus. But the minute you got to the situation where regulation was upward, where the problem was to increase rates, where the necessity was for increasing rates, the whole competitive theory went to smash on the instant. We have got to recognize that.

VITAL IMPORTANCE OF RETAINING CONSTRUCTIVE PROVISIONS OF TRANSPORTATION ACT.

My interest has been in the constructive phases of this matter. I have had occasion, as member and counsel for the Chicago Railway Terminal Commission, to study particularly the terminal situation. I have discussed it with a great many railroad officials. I have found practically no difference of opinion. There is an enormous duplication of facilities in the terminal field which would be wholly unnecessary under a correct system of railroading, and yet the remedy for that situation is impossible unless you are going to group the railroads.

May I take the time of the committee to call attention to another quotation from Mr. Ripley's report. Discussing consolidation he says:

"Another far-reaching assumption is vital to the success of this plan. This has to do with the operation of terminals at great centers. Historically, there has been the greatest diversity of experience in this regard between the carriers of the country. Some roads are peculiarly fortified as to terminals, while possessing weak lines from an operating standpoint across the open country. For others, the reverse is true. Some companies, entering the field late, enjoy good locations as to line, but have always worked under a handicap at the terminals.

Such lines are strong in the open but weak at the ends. Others—the Atlanta, Birmingham & Atlantic, for example—were really constructed across country rather to utilize an existent terminal than because of a demonstrated need for the new cross-country line. But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination.

"The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this end, it is submitted that a proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan. No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious as is its intimate connection with consolidation. The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems. Consolidation can never be effectively brought about wtihout the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in section 1, paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers.

"Possibly the assignment of terminal properties might take place by means of leases based upon valuation by the commission and at a rate fixed by the commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike."

Now, not only does the transportation act as it stands upon the statute books offer an opportunity to work this problem out along fair and constructive lines, but the National Association of Owners of Railway Securities has appeared before this body on previous occasions and offered its assistance as a practical instrumentality to bring that about, suggesting that they are willing to work out means by which they will undertake to finance some of these things. So they have come in to discuss the question of rolling stock. They have called the attention of this committee to the overplus, the excess of rolling stock, which necessarily exists under the system whereby each railroad undertakes to take care of or provide for its peak requirements.

The only thing that obscures the fallacy of the competitive system is that so many railroads are not able to take care of their peak requirements; but they are constantly striving to do so. If they succeed, or to the extent that they succeed, it is obvious that we have an overplus of facilities which the public is required to pay returns upon. If there could be a reservoir of rolling stock available from which drafts could be made by governmental authority, through the agency of the Interstate Commerce Commission or otherwise, we could immediately reduce that overplus and yet not only have as good service but have much better service to meet seasonal and regional requirements.

Take the terminal situation. I hear of a certain railroad—not a theoretical case, but an actual case. It has very excellent terminal facilities, far beyond its requirements, and it could give to its existing competitor all the facilities it needs and still have ample facilities for its own use; and it could receive from its competitor a fair return for the privilege which it allows. But will it do so? Not at all. It insists that the excess capacity of its own terminals shall not be used for the benefit of its competitors, viewing the situation always along the old line of financial competition. What happens? The competitor will be compelled to provide, as best it may, equivalent facilities, and when the struggle has gone on, and it has succeeded as far as it can, and it has such

terminals as it needs, the unnecessary cost will all appear in the property account of the railroad, and it will all be used as a basis upon which to make rates.

While it is perfectly true that the whole process is unsound economically, yet so long as the Congress does not provide, so long as the Interstate Commerce Commission does not find it practicable to make rates based on groups and avoid that difficulty by compelling one railroad owning ample terminal facilities to permit another railroad to come in on fair terms, the less advantageously equipped railroad is not to be blamed; in fact, it is the theory upon which it must proceed, to improve its transportation facilities, for the very reason pointed out by Mr. Ripley. But when you get through you have an excess investment upon which returns must be fixed.

ONLY TWO BIG SOURCES AVAILABLE FOR RATE REDUCTIONS.

This present attack is brought about by the demand of the country for a reduction of railroad rates because of the existing financial depression, particularly the situation of the farmers of the country. How are you going to reduce rates? I mean, if you are going to do it right. There are only two big sources from which you can get any reduction of rates. One is by reducing the amount which you have to pay to get new capital; and the other is by reducing operating expenses. There is no other way. That exhausts the subject as I see it.

REDUCE RATES BY STABILIZING CREDIT AND REDUCING COST OF OBTAINING MONEY.

Now, the transportation act provides a means of accomplishing the first result. It proposes to put railroad securities upon a more stable foundation; and by having less speculation in them we are going to cut down the return we have to pay on them. We are going to say we will strive for 5½ per cent—although we have not gotten much better than the half of that. But we are going to set up some standard of that kind, 5½ per cent or something like that, to be fixed by the Interstate Commerce Commission after the 1st of March next; and if any railroad gets a return in excess of 6 per cent we are going to take half of that excess and put it in a revolving fund controlled by the Interstate Commerce Commission for the use of transportation. Under that system this National Association of Owners of Railway Securities will come in and help, if we can get some such assurance as that, not that there is any guaranty by the Government, but at least we will be working toward a stabilized return. It will undertake to help to finance at lower rates of interest; to cut out commissions, brokerage, and discounts; to put these bonds more directly in the hands of investing institutions, like the life insurance companies and mutual savings banks that put them in their vaults and keep them until due, institutions that are not interested in buying and selling railroad securities, but in investing in them. It is obvious that the rate of interest on bonds can not be kept down, that you can not get down to an investment basis unless there is some assurance of at least a bona fide attempt under practicable conditions to obtain that result or to strive for it. That is what the transportation act provides, and, as I read it, that is all that it provides on this particular subject.

It is perfectly clear, I think, that by stabilizing the return on the investment you can thereby reduce the rate of interest on bonds, and you are going to enable the Interstate Commerce Commission, or the railroads themselves, to reduce rates lower than they otherwise would be. And that is particularly important for reasons that were pointed out in the report of the Federal Railroad Securities Commission, and that have been discussed in previous hearings before this committee—that bonds are inevitably becoming the form of railroad investment that must be issued in the future. You can not issue stocks any more, for reasons that were fully discussed in the report of the commission; and, as we see from the figures themselves, railway bonds are becoming more and more and more the larger percentage of the total investment. That must go on. That is the only way out. That being so clear now, if you can get those bonds on an investment basis and use the saving for the benefit of the public, certainly it is the sounder policy. The percentage of the total railroad investment represented by bonds has a real bearing on the rate of return to be allowed on the total investment. The public can and should share in the saving which stabilization of credit makes possible.

REDUCE RATES BY INCREASING EFFICIENCY AND ECONOMY OF OPERATION.

The other field from which you can get reduced rates, of course, is operating expense. The two big items of operating expense are wages and coal, or fuel. The rest is general miscellaneous expense. Of course, wages must be cut down, but they can not be cut down with an axe. Wages must come down as a reasonable adjustment of the cost of living, and as the wages of the rest of the working community come down, and as the general financial structure is adjusted to normal conditions. Fuel, I presume, is dependent upon the same principle as that, and if it requires any legislative action I assume the Congress will take it.

The remaining field of expense by the railroad companies is the field in which we have the opportunity to bring about these great efficiencies in the grouping or consolidation of railroads so as to simplify terminals and eliminate duplication and waste there and in connection with rolling stock and other facilities of that kind.

When you have grouped the railroads you can then route your traffic so as to send as much competitive through traffic as possible by the shortest line and by the lowest grade and without getting into the objectionable situation where the longest railroad is trying constantly to divert traffic at the highest cost, which the public in the end pays.

So, as I see it, the provisions of the transportation act are absolutely sound and absolutely essential; and to revert to the condition which existed prior to the passage of the act is to revert to a situation which must spell disaster. If the railroads can not be financed upon the principles of the transportation act they can not be financed at all by private agencies.

If we ought to be reducing rates in order to adjust them to general economic conditions, prices of commodities, that can only be done by resorting to taxation for the deficit which must inevitably result. There is no other way out.

I want to say a word or two to those who believe in public ownership. Even from that point of view the transportation act is the only sound method of procedure. Certainly none of those who favor Government ownership want to bring it about by process of wreckage. And yet that seems to be the inevitable result of a refusal to preserve the transportation act and to go forward instead of backward along the line it indicates. If we are going to have Government ownership of railroads let us at least prepare for it in a rational way; let us proceed toward it by reasonable and rational steps that are constructive; let us preserve the interests of the shipping public as well as the bona fide investors in these properties, particularly the investments of the savings banks and life insurance companies and other similar institutions.

If we should have Government ownership to-morrow morning we would, if we were wise, proceed along the lines of the transportation act. We would certainly begin to group the railroads and treat them as groups. The political pressure that would then exist, and as I see it properly exist, would be to see that the less favorably located portions of the country would have transportation service that is efficient and adequate; such pressure would be great, and the demand would be irresistible, as I see it, that the Government should take care of any such territory out of the more productive territory, as the transportation act provides. And then if public policy demanded additional facilities or transportation that could not be obtained out of revenues we would have to resort to the only other possible source, namely, taxation.

If you had Government ownership, what would be the policy? Would it be to attempt to have service at cost? Would it be to attempt to have the transportation system of the country carry itself out of the revenue or would there be a deficit to be met?

RATES CAN NOT FLUCTUATE WITH COMMODITY PRICES.

We followed the latter system during the war because of war conditions. Railroad rates were not put up at the time when commodity prices went up and when the commercial world in general was making large returns; because the then existing management did not believe it was wise or expedient to do so. At all events it was not done. Now, we come to the situation of falling prices and the demand is that the railroad rates come down. Railroad rates can only go down in a period of falling commodity prices if the railroads have been permitted to put them up during the other period. And yet I think the engineers who will appear here later will show that even after commodity prices started up sharply, as shown by the chart already introduced by Mr. Thorne,

yet railroad rates and railroad revenues not only did not go up but they went slightly down. It is true that after the railroads came back to private ownership and this period of sharp declines in commodity prices occurred, and there was no longer the Government to meet deficits out of taxation—and there was no longer the reason that existed during the war—railroad rates did start up, but now they have started down again.

If it were possible, which it is not, to relate railroad revenues to commodity prices, you certainly would have to have some legislation, some authoritative expression to the Interstate Commerce Commission as to the policy of the Government before that body would feel justified in putting rates up during a period of high commodity prices for the purpose of establishing a surplus to be available to meet deficits during periods of falling commodity prices. It would have to be done frankly and openly as a matter of governmental policy.

Of course, that is not suggested by anybody, and it would not be practicable if it were attempted. There would not be any measure then. They would have to guess at it, and it would depend upon circumstances whether the Interstate Commerce Commission guessed a sufficient surplus revenue to meet the next decline. If it guessed too high there would be a great public outcry; if it guessed too low the inevitable result would be reflected in the prices of railroad securities and rates of interest at which new money could be borrowed.

I have not the figures accurately in mind and I do not undertake to be accurate about them, but if you took the railroad property investment account as it stood in 1900 or 1907, and ascertained how much has been added to that account since then, you would find that some seven odd billion dollars, which has been added since 1907 under the supervision of the Interstate Commerce Commission, so that we are to assume that approximately at least it is free from objection; and if you take out of that addition to property since that time all that was put into that account from surplus, you would take out less than $1,000,000,000. And if you excluded that entirely from the rate of return—if you were to consider that as money which, as Mr. Thorne has contended before this committee, has been contributed by shippers and that rates ought not to be figured thereon; if you were just to eliminate that, and then take the total net operating revenues as they existed in 1907, and ascertain how much those revenues had increased since that time, you will find, as I recall the figures, something like $35,000,000 is the total increase between net operating revenues of 1907 and 1920. That $35,000,000 is to pay the interest on this six billion odd dollars of new money that has gone in, if we assume the rate of return in 1907 was a fair return upon the then existing property account.

Or if you compare the net operating revenue of 1907 with the standard return of $906,000,000 and assume that that more nearly represents what might be expected normally than what happened to be the return in 1920, you have $140,000,000 to $150,000,000, which is as I recall it less than 2½ per cent on the money which has gone into the property-investment account since 1907, deducting everything that went into that account out of surplus.

So that even if we agree in principle with what Mr. Thorne has suggested, namely, that rates ought not to be figured on investment from surplus, cut it all out, yet——

The CHAIRMAN (interposing). Mr. Fisher, the substance of the claim as I understand it that has been made before this committee by certain witnesses who have appeared is that railroad rates must never be higher than the traffic will bear.

Mr. FISHER. Well, and even so?

The CHAIRMAN. That is, they must be rates that will move the traffic.

Mr. FISHER. Yes, sir.

The CHAIRMAN. And the further contention is that traffic will not move unless there is a profit to the person who moves it.

Mr. FISHER. Yes, sir.

The CHAIRMAN. And that, as I understand it, means that railroad rates must always be adjusted so that the shippers will receive a profit from their transactions, possibly not at any particular moment but over any considerable period of time. And you have suggested that you do not think anybody would claim that, but that is exactly what is claimed by certain very important representatives of the shipping public.

Mr. FISHER. Mr. Chairman, I must have been unfortunate in my expression if you got that impression from what I have said. I have discussed that proposition before the Interstate Commerce Commission, and think you will find some references to it in the decision of Commissioner Lane in the horizontal

rate increase in 1910–11 in the western rate case. It is perfectly true that railroad rates ought not and can not for any substantial period of time be greater than the traffic will bear. The shipper will not ship if he can not get for his product a return which nets him something which makes it worth his while to ship. And the Interstate Commerce Commission, no matter what it may try to do toward the maintenance of a general rate percentage, can not avoid that economic law. That is shown right in the effects that are in existence to-day. You wrote into the transportation act the provision that the commission should between the time of the passage of the act and the 1st of March, 1922, undertake to secure a return of 5½ per cent, and the significant language is "as near as may be."

The CHAIRMAN. Then, we come to this perfectly impossible situation: The shippers will not ship unless they can make a profit.

Mr. FISHER. Yes.

The CHAIRMAN. If those rates involve loss on the part of the transportation companies the transportation company will not operate?

Mr. FISHER. Yes.

The CHAIRMAN. And can not operate?

Mr. FISHER. No.

The CHAIRMAN. Now, if the shippers will not ship at rates that will make a fair return to the railroads, whatever that may be, and if the railroads will not operate at less rates than will make a fair return, what are we going to do with that situation?

Mr. FISHER. Now, let us test it. First, let us suppose the Government is running the railroads. What would happen? It is perfectly obvious that the Government would either, in times of general commercial prosperity, be creating a surplus to be used to meet just such an emergency at times when the return must be below cost of operation to the railroads, or, if the Government did not wish to establish a surplus, it would have to meet the deficit out of taxation. It could not do anything else.

Now, what is the situation when the railroads are not under Government ownership? The element to which you refer introduces into railroad securities under private management that margin of speculation, that margin of uncertainty that necessarily follows from the conditions that you have outlined. To that extent you can not make railroad securities like Government bonds. To that extent they can not be absolutely stabilized. And the National Association of Owners of Railway Securities recognize that absolutely.

All they are saying and all you have said in the transportation act is that after you determine that general rate level, that general return which, in the language of your act, is a fair return upon the value of the property used and useful for transportation, you will then, from time to time, announce it and will then, by the action of the Interstate Commerce Commission, upon rate matters seek to establish it and maintain that general rate level as near as may be. That is all they ask. But there will be in that situation an element of uncertainty. The minute industrial or commercial conditions get so that the maintenance of a rate level, which would otherwise be fair, results in a decline in the volume of traffic, results in a condition where it does not pay the shipper to ship, rates must come down, if only from the narrowest point of view of railroad security owners and the railroads themselves, because the net result to them would otherwise be worse than if they did not. They much better have rates come down and move traffic and keep things going, and have industry so it is in a condition to revive when general conditions permit it to revive, than to insist upon the higher rates.

GOVERNMENT OWNERSHIP THE ONLY ALTERNATIVE IF REVENUES WILL NOT MAINTAIN THE RAILROADS.

The CHAIRMAN. I was not referring to the terms of the transportation act. I was referring to the existing situation, and if it is true that the business of this country will not maintain transportation there is but one resort, and it is to Government ownership and the maintenance of roads through taxation.

Mr. FISHER. Yes.

The CHAIRMAN. That must be evident, that if the shippers will not ship and the railroads can not run because they do not receive sufficient revenue, if that is the condition that is likely to continue any length of time, why, then, there is just one thing to do, and that is for the Government to maintain the railroads through taxation.

Mr FISHER. Yes.

The CHAIRMAN. And nobody seems to be willing to do that, and that, I think, is what is bothering present conditions. I have asked a great many farmers, who are suffering very severely, whether they are willing that in this emergency we should appropriate enough money out of the Treasury to make it possible for the railroads to continue their service, but I have never found one who was willing to do that.

TRANSPORTATION ACT SHOULD BE GIVEN FAIR TRIAL.

Mr. FISHER. I think again, Mr. Chairman, you have diagnosed the situation with absolute accuracy.

Now, the question is, admitting that they are not ready to have relief by way of taxation, what is the remedy? Now, the security owners say to the supporters of the transportation act as it now stands, or rather those who oppose its proposed amendment, let us at least—if we are not willing to go to Government ownership and to resort to taxation—let us at least have a fair trial of the act under conditions that will approximate a normal situation.

The securities owners recognize that in a business like this they have got to take the fat with the lean, or the lean with the fat. They have got to take a less return under conditions such as now exist. But they say to you, "Don't, because of the present conditions, proceed to strike out of the act such constructive provisions as you have put there."

Senator POINDEXTER. How are you going to get any fat if you are compelled to take the lean conditions now which, as you say, is about half of the rate allowed by the statute. In prosperous times you would be allowed more than 6 per cent, but you can not get it.

Mr. FISHER. Yes; we can, Senator.

Senator POINDEXTER. How can you do it under the statute?

Mr. FISHER. You can do it under this act in this way: The railroads that make more than 6 per cent, if they do make more than 6 per cent, the railroads retain half of what they make, and the other half goes into a fund, a revolving fund, which is used for the benefit of transportation.

Now, that whole excess is used to support the railroads in hard times. Why? Obviously, first, the half that is theirs is the railroads' property, and second, the half that goes into a revolving fund, while not directly the property of the railroads is used for their benefit and the benefit of the securities holders to reduce the amount that they would have to raise thereafter. That half does not appear in the amount of property that you have to pay a return on, but can be used for the benefit of the roads in hard times. So the whole does go to support the situation when, as at the present time, the amount earned is below five and a half, or whatever the rate is which you may establish. So the transportation act does do exactly what we have been discussing, and it does it in the only way that the Congress would be willing to have it done, and probably the only way in which the public would be willing to have it done.

I have talked with many business men about this situation, and they all say, "Yes; we are willing to help to stabilize this business, and to pay a fair return on the property used in transportation. We do not know how much it should be, whether it should be five and a half or some other amount; we do not know the property value on which you figure the five and a half; it may be too high, or too low. But there is a value to the property used in the transportat on service, and there is a rate of return which represents a fair return on that, which should go to those engaged in the private ownership and operation of the railroads. And we are willing that that should be fixed. But when we do that; when we stabilize your return, we want to have something coming to us. We want to know that when we produce a fair rate of return, that when the railroads are prosperous, we want to share in that. We are willing to leave something to the railroads to stimulate their energy and efficiency, but we want to divide with them; we want to take half of any return above a fair rate for the public." And that is a system under which you can do something.

Now, in addition to that, remember the provision is that the Interstate Commerce Commission shall go on and group these railroads and consolidate them on fair terms, preserving to each of them, as between themselves, those things that are right, paying more compensation to those that have the better facilities that are used for the benefit of the whole. The transportation act says that that grouping shall be brought about and that these large economies in

the situation, running into the hundreds of millions of dollars that are readily available under such a system, shall be used for the purpose of bringing down the cost of transportation.

Mr. John F. Wallace, who appeared before this committee just a short time before his unfortunate death, went into some of those questions with regard to terminals. Others went into them with regard to rolling stock. There are other questions that should be discussed. There are very large economies, in the opinion of men who are well informed on the subject and with whom I have talked, that can be effected if we can just get rid of the costs which place these unnecessary burdens upon the public.

All those economies will go to the benefit of the rate payer. And if you can get cheaper rates, if you can bring down the transportation charges, it will inure to the benefit of the rate payer and will be of advantage to the investors although the rates come down. Those are the only ways out, gentlemen. Those are the only alternatives to Government ownership and relief by taxation.

I do not want to adopt the attitude of despair, as the chairman has indicated, that the only way out is by taxation, and we will not do that; and, therefore, we must preserve the act which makes for efficiency and for economies. We must preserve it. Why not? What is the reason that these who advocate it are supporting an amendment to the transportation act? I have gone over this testimony and they say the rates are too high. That is all.

The CHAIRMAN. That is the only reason.

Mr. FISHER. That is the only reason. All right, here are the railroad executives attempting to bring these rates down right in the midst of this hearing. You have had some of the statements by Mr. Warfield, based on studies that have been made by his engineers—I grant you it is an approximation, because sufficient time has not been given for complete studies—but it is something like $200,000,000 per annum that has been taken off and the process is still going on and we have not even made a start toward these economies. They have not done a thing in the terminal situation; they have done very little with regard to the rolling stock. Mr. Warfield's association appeared with reference to the sale of the equipment certificates and demonstrated that they are an agency that are actually able to finance these certificates for the roads and for the weaker roads as well, and do it at a saving. Why? Because they cut out the middlemen and the commissions and brokerage charges. They sell direct to the investor, and that is what the railroads, under the control of the Government, ought to be doing.

This transportation act ought to have at least a chance under conditions somewhat approximating normal times. And if you have done that, and have failed; if you can not, under private ownership and operation of the ra lroads keep them earning a fair return on the value of their property used in the service, and if you can not stabilize credit, then you have got to go to Government ownership. But ne ther the Congress nor the country proposes to take that step now. And yet they propose these amendments; they propose to go boldly through the fog over the precipice. The only possible effect of striking out the 5½ per cent provision would be to serve notice on the roads and on the Interstate Commerce Commission that the public does not want that 5½, and that Congress does not want it.

Senator POINDEXTER. Why do you say that? It might be more.

Mr. FISHER. Under the circumstances, where they earned only 2.9 per cent——

Senator POINDEXTER (interposing). Of course, the 5½ per cent did not cut any figure then. But under some circumstances and occasions, some of the roads have earned that. But I am only asking you a hypothetical question.

Mr. FISHER. I understand that, Senator.

Senator POINDEXTER. You say the inference would be that the public and Congress did not want them to earn that much, and there would be no alternative. There was an alternative before that provision went into the law; that was when you were allowed to earn money in accordance with the condition of business in the country, and it fell off in bad times, and increased in good times.

Mr. FISHER. I am afraid the statistics I have will not show the condition you describe prior to the passage of the act. At least, it did not happen. Our engineers will present before this committee a statement of what did happen. They do not find that conditions were getting better prior to the war. They were getting worse when the Government took the railroads over. And then when the Government took them over, and added much property for which it paid twice

the amount which would be necessary in normal times, and turned the roads back to the owners with nothing in the treasuries, it certainly did not look good then. You could not sell bonds then. Certainly not, upon favorable terms.

Senator POINDEXTER. The three-year term was fairly prosperous.

Mr. FISHER. Yes; but that was not the entire——

The CHAIRMAN (interposing). The highest return, the average, was less than 5½.

Mr. FISHER. Yes.

The CHAIRMAN. The highest was 6 per cent over a small territory. The average return for the three best years—that is, the three years before the Government took them over—was 5.24.

Senator POINDEXTER. That is for the whole country?

Mr. FISHER. Yes. And I would not undertake to say that if you grouped the railroads under some such grouping as the Interstate Commerce Commission would provide, that you could not find some railroads that would produce better than 5½.

But I want to deal with realities. I have talked with many people about the matter, and I think I can say that the impression produced on your regulatory authorities by striking out the 5½ per cent would be that they would regard it, not that Congress thought that it was too low, but that it thought it was too much.

And why strike it out when on the 1st of March the Interstate Commerce Commission is to take up the question and determine what it ought to be? If 5½ is too high or if it is too low they must determine it. Some significance would be attached to the action of Congress if it should strike out that provision just about four months before its expiration. What would be the significance of it, particularly when it is brought about by the pressure on the part of the country with respect to the burdens being too heavy? You are not striking it out because the railroads come in and say it is too low. The movement is on behalf of those who say that it is too high; that it is too burdensome to the people. It must have that significance.

But I say frankly that the 5½ is not the thing that concerns me most. I agree with the chairman of the committee that the real purpose of those who are asking for these amendments to the transportation act is to destroy the whole principle of group rate making. It would amount to a destruction of the groupings and would result in going back to the only alternative of making rates on individual roads, or, what is more likely to happen, making them on nothing; making them on the by and large rule of thumb principle. A certain railroad rate official who appeared in the eastern advance rate case in 1910 and testified on the stand, under cross-examination, said that rates were not made according to any rule; they were made by a sort of intuition on the part of the rate maker. It was something like the game of golf; one player would have a St. Andrews swing and another would simply swat the ball. It didn't make any difference, if he got the results. And if you got results under which traffic moved, and if the rates were not higher than the traffic would bear, it didn't make any difference how they were made.

Now, that is really true. You talk with the commissioners and they will tell you this: We try to keep in mind the general return on the roads as a whole and the general return on such groups of roads as are naturally related to each other. But it is only once in a long while that they discuss the general rate level. The matters that ordinarily come before the commission are with reference to particular rates.

The trouble with railroad rates is this maze of railroads, with interlocking corporations, and divisions of rates and joint rates until the whole thing is a maze, so that you do not get at it by any clear tests or standards. And the commissions bear that in mind; and they refer to it. They feel that although it is the function of the commission to fix the rates that the legislative body, the body that makes the laws, should determine whether rates shall be established to provide a specific return on the property used in the service and what shall be done with any excess. The legislative body would have the power itself to make the rates.

Senator POINDEXTER. It has the power to name them, but not to earn them.

Mr. FISHER. No; but it has a right to say what the return shall be limited to, and if it limits it to something that is not confiscatory, the act of Congress will stand. After all, it is a legislative question. Chief Justice Taft, in an opinion quoted in part by Mr. Warfield in his remarks, not only clearly pointed out that

the legislative body has power to deal with the excess profits, but he also announced clearly the sound economic principle on which the transportation act is based.

Now, why set the clock back? And it is going to set it back if these great economies and efficiencies which are possible under the act can not be secured. That is the object of the act. We must keep down the expenses, and we can not keep down the expenses if the old methods are to continue.

Senator POINDEXTER. Allow me to suggest there——

Mr. FISHER (interposing). Yes.

Senator POINDEXTER. I do not want you to understand that I am announcing any conclusion, of course.

Mr. FISHER. I understand.

Senator POINDEXTER. Do you regard that the requirements of certain things of the railroads has any connection with the 5½ per cent provision.

Mr. FISHER. Yes; I do. I think that is one of the things which justifies the 5½ per cent provision. When you allow the roads to produce 5½ per cent, or any other return on their property that will stabilize their credit, you have a right then to require that they themselves voluntarily or under the authority of the Interstate Commerce Commission will bring about these various economies which will justify us in doing what we are doing for them. The transportation act says in terms that this whole thing is based on the theory that the railroads will hereafter be economically and efficiently administered under the direction of the Interstate Commerce Commission, and that the Interstate Commerce Commission shall have the power to do various things which prior to this act the Interstate Commerce Commission did not have the power—at least the statutory power—to do.

Senator POINDEXTER. If the consequences of these amendments would be so disastrous, as I understand you to say they would be, forcing to Government ownership or administration, what are you going to do after the 1st of March, 1922, at the expiration of this act, when the 5½ per cent rate fixed in the act expires by limitation?

Mr. FISHER. After the 1st of March, 1922, the transportation act provides in so many words that the Interstate Commerce Commission shall take up the whole subject; it is open then for discussion and for determination by the Interstate Commerce Commission. They will determine what rate shall take the place of the 5½ per cent; they will determine what is that rate which constitutes a fair return on the property used and useful in the public service from time to time. And they will declare it. And if the public thinks it is too much, it can come to the commission and ask for a reduction, and if the railroads think it is too low, they can suggest to the contrary.

The CHAIRMAN. That is what these objectors want repealed; they want repeal of more than the 5½ per cent provision.

Mr. FISHER. Yes; that is true. But why should not that be the law? It was theoretically the law before the passage of this act by the Congress. The commission did hear discussions on those points. But it did not then have the power to do those things which should be done, if that theory be correct. We are not going to group these railroads for the benefit of the railroads merely; we group them for the purpose of making rates which will bring a fair return on the property in each group, and bring about those economies which will reduce the cost of the operation of the railroads, and thereby make the grouping beneficial to the public as well as to the railroads.

Mr. Johnson asks me to read here just what the Interstate Commerce Commission said in the Eastern Advance Rate case, as found in the Twentieth Interstate Commerce Commission, page 243. In that case is the following expression by the commission, speaking through Judge Prouty, of the limitations of which the commission was conscious in determining applications for general advances in rates based on revenue considerations and upon the return upon railway property.

The CHAIRMAN. You might state the date at which that decision was rendered.

Mr. CLARKE. It was 1910.

The CHAIRMAN. It was before the Government took possession of the railroads?

Mr. FISHER. Yes, sir.

The CHAIRMAN. This one is 1910, is it?

Mr. CLARKE. Yes, sir.

The CHAIRMAN. There were several decisions.

Mr. CLARKE. The case for the general proposed increased rate, which was disallowed, was in 1910.

This is what Judge Prouty said in this case in 1910:

"Further reflection confirms what this commission, having under advisement a similar question, said In re Proposed Advances in Freight Rates (9 I. C. C. Rep., 382, 404):

"'It is plain that until there be fixed, either by legislative enactment or judicial interpretation, some definite basis for the valuation of railroad property, and some limit up to which that property shall be allowed to earn upon that valuation, there can be no exact determination of these questions. In the absence of such a standard the tribunal, whether court or commission, which is called upon to consider this matter can only rely upon the exercise of its best judgment.'

"We must take the history of these properties and, from a consideration of all the facts before us, arrive at some rough notion of their value for railroad purposes. As a part of that same inquiry we must form some idea of the rate of return to which the property of these carriers is entitled.

"Here, again, it should be observed that this commission has no jurisdiction to deal with that question as such. We have no authority to say that a railroad ought to earn, either as a matter of right or as a matter of public policy, any given per cent upon its value; but in discharging our duty, to say whether these particular rates which the carriers propose to establish are just and reasonable, we must determine in a general way what a fair return would be; and that matter will be next considered."

The CHAIRMAN. Congress has tried to do both those things. In 1913 it passed the act providing for valuation by the commission, and in 1920 it passed the act authorizing the grouping, and still there seems to be some discontent in the country.

Mr. FISHER. Senator, I do not believe there is any discontent in the country on account of the transportation act at all. I believe it is discontent as against the existing rate levels, and that is all. They are striking in the dark, and that is the only thing they have to strike at, and so they strike at the transportation act. That is all there is to it. It is not a thinking objection to the transportation act. You talk, as I have talked, with the shippers, large and small, and they agree with the theory of the transportation act. They come back to the proposition that freight rates are so high that it is destructive to their business. It is just an unthinking attack.

Of course, if the existing freight rate structure was producing 5½ per cent, or anything like it, I think it would be perfectly legitimate in your consideration of this matter to consider that. But in the act itself you said it should be 5½ per cent, "as near as may be." The difficulty is, they are making only a little over half of the 5½ per cent.

Let me say this: I do not wish to appear as a critic of the railroad executives. Nobody can have a higher appreciation than I have of the difficulties under which they labor. But it takes only one or two unreasonable men in a group like that to block efficiency.

If the members of this committee will go back to the testimony of Director Colston with reference to interline billing, you will see how it works there. Mr. Colston advocated the simplifying of billing, so that you could use a system of percentages, instead of figuring out every little rate, and Mr. Colston said that it was estimated that by using those percentages it would produce a saving of from a half million to two million dollars a year. But do you suppose they can get it through? Not at all. Why? Because a few executives do not want to apply it. Why? Because they think they have a little advantage there in some way that will disappear in working it out by percentages. That can be the only possible reason, because railway accountants who have been advocating efficiency and economy say that it would effect an economy, and yet they refuse to accept it. And so it is on a multiplicity of things. The situation is similar with reference to terminal facilities and termnal charges, and a number of other things are in that situation.

We are just now having very active work with reference to the terminal system in Chicago. There is a most enormous terminal system there, with a senseless duplication in railroad properties. It is a situation where each railroad feels that it must have facilities for itself, or for itself and some other road with which it is in alliance, and that they have to have sufficient facilities to take care of all future developments. And then in some cases where one of the roads get hold of some property for which it has no apparent, or at least

immediate use, but for which its competitor might have use in its traffic, it will hold on to that piece of property. And there is that whole investment and that duplication of property which would be very much simplified, and the property cut in two, if they were coordinated. And many officials are enthusiastic advocates of it. But they can not bring it about, unless the Interstate Commerce Commission, or somebody in authority created by this Congress says, Gentlemen, you must bring it about; you can do these things among yourselves, so that out of the total return you will each get that proportionate amount to which you are entitled, according to what each of you contribute to the entire terminal system. You may preserve your rights, but you must get rid of this duplication and waste.

Senator POINDEXTER. There has been some progress made there toward a union, has there not; are not the systems joining hands now?

Mr FISHER. Some. The things you have in mind are, I presume, the things that have been done under the direction of the commission, and there are some things now in process. The city of Chicago has constituted a railroad terminal commission, of which I am a member and have been for years. That commission has made a careful study and has made a report which, I believe has been called to the attention of your body. And they lay down certain general principles toward which they work. Take the Illinois Central Railroad and the situation on the lake front. That is a very valuable property; one of the best terminal properties in the world. We joined with the railroad and got authority from the War Department to widen the property beyond the Illinois Central tracks, and to construct a public park out there, after we had filled in the lake; and we granted these things to the Illinois Central provided it would do certain things. Among other things, we provided that they should allow other railroads to use their facilities. They claim that they will have adequate facilities to take care of all through passenger trains that enter Chicago.

Of course, the North Western has a new station, and the Pennsylvania and the Panhandle, which is the same thing, and the Milwaukee and the "Q," and the Alton came into the Union Depot, but for the other railroads, the Illinois Central says it has adequate facilities for these. And they want them to come in and share with them. We said, All right, we will help you, but we want you to do certain things. And we put into the ordinance, which was passed, giving the Illinois Central the right to do these things, a provision that any railroad that wanted to come in should be allowed to come in and use those facilities, and that if they could not agree on a basis on which it should be done, that the matter should be referred to the Interstate Commerce Commission, and that the decisions of the Interstate Commerce Commission would be binding, and that the Illinois Central would take what the commission said was fair. So we created a situation there that we did not have before on the lake front. We created a situation that we did not have any authority for in the law. And movements of that kind are going on now.

Senator POINDEXTER. You did it under the authority of the law; the law permitted you to do it?

Mr. FISHER. Yes; there was no prohibition in the law.

In an action that is pending now with reference to the New York Central, we suggested that the commission should determine what a sound terminal policy was, and then its approval would be refused, if it did not conform to sound policy. or it would grant it, if it did conform to sound policy, if it was made to conform.

But here the Interstate Commerce Commission is just beginning its policy. and you are asked to strike these things out of the act. If they are stricken out, the commission will discontinue its work the next day, and all this work will be stopped, if you amend this act as it is proposed. It all depends on the grouping principle.

Take the situation in St. Louis. There is a situation where they have had a terminal association, which was referred to in the report of Mr. Ripley.

Now, when the Chicago Junction Railroad case was on, they produced a gentleman from St. Louis, an engineer, who was working on that proposition in St. Louis, and he favored the union of the New York Central with the Chicago Junction, he thought we were carrying unification of terminals too far. I am now informed that a commission in St. Louis, which has been formed to continue that work there is prepared to make a recommendation favorable to unification. And so it is all over the country.

But the strongest and most potent factor would be the help of the Interstate Commerce Commission; it is the only body that can reach the situations in the

great commercial centers. And I beg of you gentlemen not to permit this act to be amended as proposed because of a situat on wh ch bears a little hard on certain shippers. Where the freight rates are too heavy, there is a way to reach that. The rates do bear rather heavily on the farmers, that is true. But in those cases we must get those rates down. Where they are so high, let us bring them down, as the commission has authority to do. But do not strike down the standards which you have set up, and do not strike down this system of grouping.

UNSOUNDNESS OF PROPOSED AMENDMENTS RELATING TO INTRASTATE COMMERCE.

Now, I have just a little more to say about the intrastate rates. So far as the witnesses are concerned, I do not know that anybody claims that the Interstate Commerce Commiss on should not be given authority over intrastate rates to the extent that those rates interfere with interstate commerce, or are an undue burden on it. The question here is whether the interpretation which the comm:ssion has put upon the act has gone beyond that which was justified.

In the first place, the commission claims that it has not in any way strained that act. If it has in some instances, let us correct those instances. The courts w ll certa'nly correct them when it comes before them. And the matter is now before the courts in many forms, and it has been argued before the Supreme Court on the main case.

But that is not the point. I have not seen any evidence from those who would change the act that would not make the situation worse than it was before. You can not just strike it out and have nothing left. Certainly, you can not do what the Capper bill proposes, to strike it out and say that the Interstate Commerce Commiss:on can not have any jurisdiction over the intrastate rates. That goes back of the Shreveport case. So that the State commission shall have jurisdiction over State rates and facilities. The language that was presented by the State comm ssions, it seems to me, will not stand analysis, nor produce the results intended. It certainly goes away behind the Shreveport decision. Now, no one has yet suggested language which would confine it to the doctrine of the Illinois and Shreveport decisions.

The CHAIRMAN. The language we did employ we intended to conform to the Shreveport decision and the Illinois case.

Mr. FISHER. Yes; I think so. But, what are the propositions before you? The Capper bill, which you could not recommend, certainly, because it not only str kes down the doctrine in the Ill nois case, but goes away back and says that the Interstate Commerce Commission shall have no jurisdiction over the State rates or facilities. That certainly sets the clock away back. Nobody has suggested language here which would, in my judgment, take the place of what we now have. Before you change the State and interstate system, you must have a body which can act promptly——

The CHAIRMAN (interposing) Have you seen the amendments which have been presented here by Mr. Benton?

Mr. FISHER. Yes; and they seem to me very objectionable in that respect. I would be glad to discuss them, if you think desirable. The language, as I understand it, is on page 257; the proposed amendments begin on page 257, of the printed record of the hearings. These are the amendments proposed [reading]:

"That paragraphs (3) and (4) of section 13 of the interstate commerce act, as amended, be amended to read as follows:

"'(3) Whenever, in any invest gation under the prov sions of this act, there shall be brought in issue any rate, fare, charge, classification, regulation or practice made, imposed, or required to be kept in force by authority of any State, the commission, before proceed ng to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding.'"

Up to that point Mr. Benton said the law was unchanged, except in the respect which he noted that the right of the carrier to institute the proceedings is eliminated.

And let me pause just long enough to inquire, Why eliminate that? If the carrier says there is an undue burden on intrastate traffic, why should he not be permitted to bring about an inquiry? What is everybody's business is nobody's business. Why should not the carrier be permitted to institute the inquiry? I do not see any objection to it. It certainly facilitates a right decision.

Then the amendment continues [reading]:

"Before making any finding that the imposition or keeping in force of such rate, fare, charge, classification, regulation, or practice is within the in-

hibition of any provision of this act, the commission shall confer with the authorities of such State or States so notified having regulatory jurisdiction over the class of persons and corporations subject to this act, or afford opportunity for conference concerning the relationship between rate structures and practices of carriers subject to the jurisdiction of the State and Federal authorities, respectively, and the effect of the same upon the person or persons or locality or localities engaged in interstate commerce claimed to be injured thereby, with a view to a full understanding of the entire situation by both State and Federal authorities, so that such structures and practices may be brought into harmony by any necessary changes in the same through action of either State or Federal authorities, or both, without the making by the commission of an order of the character authorized in paragraph (4) of this section, and to that end the commission is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State authorities on any matter wherein the commission is empowered to act. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act."

That is the end of that paragraph. That is in general line with the provisions of the transportation act as it now stands. I have not in mind now the precise machinery that is set up or its operation. So, I have no suggestion to make about that. But that does not touch the main point [continuing reading]:

"(4) Whenever after any such investigation and a full hearing the commission shall find that the imposition or keeping in force of any particular rate, fare, charge, classification, regulation, or practice made, imposed, or required to be kept in force by any State constitutes a discrimination within the inhibition of this act, which can not be removed in the manner contemplated by paragraph (3) of this section, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed by the carrier or carriers theretofore found to have discriminated in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination, and such carrier or carriers shall thereafter observe the same, while the order of the commission continues in effect, the law of any State, or the decision or order of the commission continues in effect, the law of any State, or the decision or order of any State authority to the contrary notwithstanding: *Provided*, That no rate, fare, charge, classification, regulation, or practice applicable to the transportation of persons or property in intrastate commerce, made, imposed, or required to be kept in force by authority of any State, shall be set aside, or held to be within the inhibition of any section of this act, solely by reason of the fact that it yields to the inhibition of any section of this act, solely by reason of the fact that it yields to the carrier a different revenue from that received for corresponding mileage from the interstate rate with which it is compared, but only if the same shall be found from competent evidence to injure a person or persons, or a locality or localities, engaged in interstate commerce to such an extent as seriously to diminish the business of such person or persons or seriously to retard the growth and development of such locality or localities; and unless the same shall also be found from competent evidence to be unreasonable and noncompensatory in such State under honest, efficient, and economical management and operation."

In other words, it doesn't make any difference how discriminatory it may be, if the rate is not noncompensatory you can not disturb it. So it may injure both persons and localities; it may be discriminatory, and yet if it is compensatory, that ends the discussion. Certainly, that is not the doctrine of the Shreveport case [continuing reading]:

"*Provided further*, That whenever the commission shall make any order prescribing any rate, fare, charge, classification, regulation, or practice, for intrastate application it shall make a report of the facts found from the evidence in the record, upon which it bases the findings hereinbefore provided for: *And provided further*, That no order of the commission, made under the authority of this paragraph, prescribing any rate, fare, charge, classification, regulation, or practice shall operate to prevent the exercise"—

Now, listen to this [continuing reading]:

"Shall operate to prevent the exercise by any State of its regulatory power with respect thereto for a longer period than two years from the date when said order shall become effective."

The CHAIRMAN. You will observe, a little lower down on that page, that I made the same observation that you did.

Mr. FISHER. You did.

The CHAIRMAN. Mr. Benton, however, thought otherwise, as you will find in his statement following mine.

Mr. FISHER. Well, I don't think he even thought otherwise. Let us see what he says. He says [reading]:

"Senator, it is true that it has been held explicitly by the Supreme Court that in a discrimination case the question of the reasonableness of the respective rates is not in issue. The question is that of discrimination. That was decided in the case of American Express Co. *v.* Caldwell, the South Dakota Express case, which I think has been cited in the record. The purpose of this provision is to make it an issue to this extent only, that the Interstate Commerce Commission shall not set aside a State rate without inquiry as to its reasonableness, as it has been doing in these cases, but shall consider whether in fact it is reasonable. If it is reasonable it shall make such adjustment in the interstate rate as is necessary in order that both rates may be reasonable and fair."

But did he answer your objection about discrimination?

The CHAIRMAN. I do not now pass on that.

Mr. FISHER. I don't think he did. I think Mr. Benton did the best he could in defense of the amendment, but I don't think he met the objection.

Certainly that amendment goes back of the Shreveport case. Now, I am one of those who believe that the State commissions can serve a useful function as a check on the Interstate Commerce Commission, but I am also one of those who think that the two can be coordinated and still be useful. But when it is demonstrated, and it must be left to the determination of the Interstate Commerce Commission—it can not be left to both the State and Interstate Commerce Commissions—that a rate does work discrimination in relation to the interstate commerce or rates, so that it constitutes a burden on the interstate commerce or rates, then I think the Interstate Commerce Commission should have the right to set aside the rates and actions of the State commission; otherwise we get back into the same situation that we were before the act was passed.

Now, I have already taken much more time than I should have taken in the discussion of this matter. But I want to readvert briefly to the main proposition which interests me. And that is the constructive policy that this act makes possible. I am not interested merely in a defeat of the amendments of the transportation act that are here proposed, although that is the matter before the committee and that is the matter chiefly under discussion.

CONGRESS SHOULD ENACT CONSTRUCTIVE LEGISLATION PROPOSED BY SECURITY OWNERS.

But I do hope that the Congress and the country will give this transportation act a fair trial and not amend it until it has a fair chance to function, and that you will go on and make new provisions with a view of bettering it according to the suggestion of the securities owners and as they have asked you to do. They have asked you for the incorporation of a company which shall operate as a coordinating agency to buy this equipment; to help finance the terminal situations. Not for profit; all the profit that may result from its operation is to be the property of the Government of the United States. The stock is to be held by the Treasury, and the stock is to be subject to the direction and control of the Interstate Commerce Commission, but its purpose is to enable the securities owners, the great investing bodies, to get into the situation where they see that their interests are materially threatened, and assist you and the public by their efforts, by inducing these economies, beginning with the economy in the rate of interest on the bonds and the elimination of commissions and brokerage fees and discounts. If you will stabilize these securities so that they become, as they would become, the next most stable securities to Government bonds themselves, these great mutual institutions, like the savings banks and the life insurance companies, would then be justified and would buy bonds directly, and by putting them in their treasuries and keeping them there until maturity they would assist you materially in financing the railroads, thereby saving enormous amounts of money, which can at once be reflected in the lessened rates to shippers. And then they can go on, Mr. Chairman, in the proposed legislation and carry out an economical program with reference to the rolling stock, and the control of the terminals, etc.

I don't like to repeat, but just let us fix our attention for a moment, if I may, upon that. They say: Here the different railroads buy this rolling stock. They paint the name of the company on the side of the box car, and it disappears off the line of the owning carrier, and nobody knows when it comes back. It gets out of repair on the line of the nonowner, and unless it is so that it can not operate, which is the general rule, it is not properly repaired, or if the repair shops of the nonowning carrier happen to be idle, or not very busy, it will be shunted in there and repaired, but it can not be done in an efficient, economical manner.

Now they say: Let us finance these certificates, buy this rolling stock, and then let us provide a common agency that will police cars and repair them. Let us standardize the rolling stock so far as we can, and thereby introduce enormous efficiencies in railroad operation.

The railroad system of this country has to its credit the most marvelous showing with respect to the rate per ton-mile, due to the long distance carriage of bulk freight. The two great problems that it has not really done itself credit in, as I see it, are the problem of terminals and the problem of rolling stock, either the movement of rolling stock or its original construction and repair, and it can not under this separate ownership and management be sufficiently taken care of; it must be coordinated in some way, and the only way that can be done is through some agency that is not interested in the fortunes of some single road or some single system, but is interested in all of them, is in harmony of interest with them because it owns the securities of all of them, or many of them, coming in and attempting to introduce efficiency and economies that are possible only in some such way. That is the affirmative movement. That is the thing that the transportation act points to, and is the thing that I am personally much more interested in than I am in the details with regard to State and interstate traffic.

I thank you very much for your attention.

STATEMENT OF MR. F. A. MOLITOR, NEW YORK CITY, CHAIRMAN OF THE BOARD OF ECONOMICS AND ENGINEERING OF THE NATIONAL ASSOCIATION OF THE OWNERS OF RAILROAD SECURITIES.

Mr. MOLITOR. Mr. Chairman, my name is F. A. Molitor; I reside in New York City; and am chairman of the board of economics and engineering of the National Association of Owners of Railroad Securities.

Mr. Chairman and gentlemen of the committee, I first want to express my regret that I was unable to be present here at the hearing in June, when some of my associates were here and at which time Mr. Warfield for the association, and the late John F. Wallace and others, presented some figures to you. Unfortunately at that time, Mr. Chairman, Mr. Warfield was commandeering my services for another purpose, my services having been desired temporarily to make an examintion for the Secretary of War of the railroad properties on the Panama Canal, both the railroad and steamship companies. It may be of interest to the committee at some time when a question of Government ownership may come up to examine my report to the honorable Secretary in that connection.

Mr. Chairman, it would seem appropriate to put before you now the condition of the carriers as they exist. Our board made an analysis and study of the operating conditions and I will submit a few figures, which will not take long. And probably I will use rounds numbers, but in the records we will file the figures that are exact in their nature.

On September 1, 1921, 12 months of operation under the new tariffs, placed in effect by the Interstate Commerce Commission in accordance with the transportation act, enables us to obtain a year's operating result, which I believe will be of very much interest to you. It must be borne in mind in this connection that substantially the rate structure put in effect under Ex parte 74 on August 6, 1920, was in effect during most of that 12 months. The rate reductions which were made, both on the part of the Interstate Commerce Commission and on the part of the carriers, were approximately not effective until the latter months.

And I also desire to call attention in these figures that in the operation results only two months, namely, July and August, were after the wage reductions had been made by the Labor Board on July 1, 1921, and those figures are reflected in the income.

The result of those 12 months of operations of class 1 railroads—the operating income for those 12 months on the class 1 railroads up to September 1,

1921, is $530,655,427. This results in a net return upon the tentative valuation placed by the commission of $18,900,000,000 of only 2.85 per cent.

It must be remembered that the valuation of $18,900,000,000 includes class 2 and class 3 roads, while the statistics of 1921 cover only class 1 roads, which are approximately 90 per cent of the total mileage. The figures may, however, be held to apply closely to class 1 roads only, since the Interstate Commerce Commission shows the total capital investment in class 1 roads at $18,599,000,000. The latter figure is used in this statement.

August is a month of very good business usually. The months of August, September, and October are usually the months of the best business. The last month, August, shows an operating income of $90,241,000, which, compared with the weighted average requirement for August, showed a net return on the tentative valuation of 5 per sent. During the month of August the decrease in wages last granted by the Railroad Labor Board was in effect, but it must also be borne in mind that August is a month of heavy traffic, and, as will be shown later, the maintenance expenses for the 12 months ending with August were much below normal. So it is obvious that under the conditions now prevailing as to tariffs and wages the railroads in the immediate future, at least, will not earn by a large sum a net return of 6 per cent, or even 5½ per cent.

Had the reduction in the wage scale that was put in effect by the Railroad Labor Board on July 1, 1921, been effective for the entire 12 months ended August 31, 1921, the operating results would have been very different. The operating railway income in such event would have resulted in a net income of $834,822,587, which is equivalent to a net return upon the tentative valuation of only 4.48 per cent.

It may be said, therefore, that if the business of the next 12 months equals approximately that of the 12 months ended August 31, 1921, without any change in the present wage scale and tariffs, the results of operation will be a return on the tentative valuation of only 4.48 per cent. And that refers to class I railroads only. If all the carriers are taken into consideration, it would result in a net return of 4.42 per cent.

In what I have stated here in respect to increases it would seem important now to bring to your attention the fact that the maintenance expenses have been very considerably below normal. A fundamental requirement on any property is the maintenance of the production plant. On a railroad property this means that wear and tear on road and equipment must be covered by current repairs and current replacements of material worn out. To continue to defer such maintenance, and not to take care of this maintenance of a transportation property invite disaster in operation and increases the financial requirements in later periods.

Now, in the 12 months ended August 31, 1921, there was a general reduction in the operating ratio on all railroads. A study of detailed statistics shows that this increase in net income was apparent rather than real, since it was largely obtained by sacrificing maintenance of both road and equipment to a ratio as compared with revenue far below the proportion that experience has demonstrated to be safe.

The comparative figures of maintenance for 1920 and 1921 are as follows:

For the year ending August 31, 1920, for maintenance of way and structures, $965,807,008; and for the year ended August 31, 1921, for the same maintenance of way and structures, $846,916 204, or a decrease of $118,846,804, which is equivalent to 12.2 per cent decrease in the maintenance of way and structures expenses alone.

The maintenance of equipment expense for the year ending August 31, 1920, was $1,501,371,402; while for the year ending August 31, 1921, the maintenance of equipment expense was $1,394.333,217, or a decrease of $107,038,185, or a decrease of 7.13 per cent. The total deferred maintenance for the last year was $225,884,989, or 9.16 per cent decrease in the total maintenance expenses. This is equivalent to 1.22 per cent on the tentative valuation of class I railroads.

The failure of the carriers to properly maintain the properties was undoubtedly due to lack of income, but the result is to seriously impair the value of the assets on which railroad credit is based.

Two other facts in connection with this subject which are important in the present situation are the following:

First, the deferred maintenance must be made good in subsequent years, and at great cost; and, second, due to insufficient maintenance the percentage of return on the property valuation for the year ended August 31, 1921, as indicated

above to be 4.48 per cent, is inflated to the extent of 1.22 per cent of the probable return for the year ended August 31, 1922, a corresponding amount; in other words, the real return is only 3.2 per cent for the year 1921, upon the tentative valuation placed by the commission.

It seems clear to us that in the readjustment now taking place in the general business of the Nation that there is a reasonable hope that a greater volume of business may be offered the railroads during the coming year. Given time to restore the transportation plant to a reasonable state of repair and realize the effect of economies in interchange operation now being planned, it may be possible for the railroads to successfully weather the readjustment period. In their present condition and with a volume of business equal to that of the past year no immediate revision of tariffs downward is practicable without a compensating reduction in expense. Aside from economies it is impossible to institute reduction of expenses beyond the control of the railroads. The major item of expenses, namely, the pay roll, can be adjusted to balance the compensation of employees to harmonize with the reduced cost of living, but this adjustment is entirely under the jurisdiction of the labor board.

That, Mr. Chairman, is the condition of the properties as we find it since the passage of the transportation act.

Mr. WARFIELD. Col. Molitor, with respect to the figures you have given, what was your whole revenue with respect to operating income?

Mr. MOLITOR. The operating income was $834,822,587.

Mr. WARFIELD. That is on the 25 per cent increase?

Mr. MOLITOR. Yes, sir.

Mr. WARFIELD. I don't think you made it quite plain to the Senators what the conditions would be if the properties were maintained normally. I think there are two figures there. Not only the figures in 1920, but the normal figures, because what this committee wants to get at, I think, is that in the event of the carriers being maintained under normal maintenance what would be the results of existing rates?

Senator POINDEXTER (presiding). He has stated that as 3.2 per cent.

Mr. MOLITOR. I am coming to that, Mr. Warfield, in these tables.

Mr. WARFIELD. That is in the past. But now, coming to the future?

Mr. MOLITOR. I quite understand, and I will come to that later.

Mr. WARFIELD. In other words, Mr. Chairman, the papers give the carriers as earning certain amounts from time to time, but they do not take into account, or at least I do not see any statement that they do take into account, the fact that these figures are secured under great stress in matters of economies in maintenance, and I thought you would like to have those figures.

Senator POINDEXTER (presiding). That is one of the criticisms made of the operation—that they are unwisely neglecting maintenance.

Mr. WARFIELD. Yes.

Mr. MOLITOR. Mr. Chairman, the figures Mr. Warfield refers to are included in the data I am placing in the record. I can not too strongly suggest to you the necessity of forecasting results if present policies are permitted to continue and before it is too late. For if these policies are allowed to continue the inevitable result must be either bankruptcy for the railroads as a whole, a transportation system totally inadequate to meet the agricultural and business demands of the country, or the raising of railroad deficits by taxation—which means Government ownership.

The Board of Economics and Engineering, which I represent here, believes there is an alternative in putting into effect those provisions of the transportation act which make for economical operation and other methods that were laid before this committee in June last. I will now endeavor to present the forecast I refer to by giving in condensed form the comparative figures Mr. Warfield refers to.

The net operating income for all class I railroads for the 12 months ending August 31, 1921, was, as I have stated, $530,655,927, or 2.85 per cent on the commission's tentative valuation of all class I carriers. Maintenance of way and equipment for that period was $225 000,000 less than in the 12 months ending August 31, 1920, or an undermaintenance of 9.16 per cent. In this deficit maintenance of way suffered more than maintenance of equipment, the deficit for the former being 12.2 per cent and for the latter 7.13 per cent, the combined percentage being 9.16 per cent. If normal maintenance expenditures had been applied to that period, the net operating income would have been $304,770,938, or only 1.63 per cent upon the tentative valuation.

Now, assuming as much as a 10 per cent increase in volume of freight for the coming year instead of the 5 per cent increase previously mentioned, the net operating income for the 12 months ending August 31, 1922, would be $666,755,320, or 3.58 per cent on the tentative valuation, considering approximately the result of the decreases in rates already made, which we have estimated at $214,000,000. In using the 10 per cent increase in volume of business I would like to call your attention, Senator, to the fact that the difference between good business and bad business in the whole United States is reflected in railway earnings by a difference not exceeding 15 per cent. Deduct normal maintenance, essential to supply adequate transportation and protect the securities issued by the class I railroads. the net operating income would be $440,879,331, or 2.36 per cent on the tentative valuation. This is without making any provision for the necessary expenditures for additions and betterments. If adequate transportation facilities are to be provided, such conditions as are here shown must be taken care of from some source either by a far-reaching program of economies in railroad administration or by taxation. We believe the former policy aided by the economies now being worked out will largely meet the impending disastrous outlook and hope this committee will consider the association's suggestions in respect thereto. Our board is conducting investigations along the lines suggested by the association which will later be at the disposal of your committee, Mr. Chairman, and of the Interstate Commerce Commission. I think I have covered the ground suggested by Mr. Warfield.

Mr. MOLITOR. Now, I have here a little statement which will bring out the answers to the questions that Mr. Warfield has raised, because we felt that these things would be of interest to you to know how they were figured out in various situations.

Senator POINDEXTER (presiding). Designate that in some way and put it in the record.

Mr. MOLITOR. This is a statement showing the financial position of Class I roads for 12 months ending August 31, 1921, and estimates of constructive years based on the same figures.

Senator POINDEXTER (presiding). It may go in the record.

(The statement referred to is as follows:)

Board of Economics and Engineering—Financial position of Class I roads for 12 months ending Aug. 31, 1921, and estimates of constructive years, based on same figures.

[Data from Interstate Commerce Commission advance statistics and Bureau of Railway Economics.]

Net railway operating income, class 1 railroads and large switching and terminal companies.	Twelve months ending Aug. 31, 1921. (1)	Wages equated on same basis as July and August. (2)	10 per cent increase in volume of freight only; wages equated on same basis as July and August. (3)	Forecast for 12 months ending Sept. 21, 1922; increase 5 per cent in volume of freight and decrease 5 per cent in freight rates; wages equated on same basis as July and August. (4)
Average miles operated	235,407	235,407	235,407	235,407
Railway operating revenues:				
Freight	$4,279,028,733	$4,279,028,733	$4,279,028,733	$4,279,028,733
Add 10 per cent increase in volume			427,902,873	
Add 5 per cent increase in volume				203,253,864
Less 5 per cent decrease in rates				213,951,436
Result	4,279,028,733	4,279,028,733	4,706,931,606	4,268,331,161
Passenger	1,258,394,376	1,258,394,376	1,258,394,376	1,258,394,376
Mail	97,243,960	97,243,960	97,243,960	97,243,960
Express	99,638,415	99,638,415	99,638,415	99,638,415
All others	311,032,616	311,032,616	311,032,616	311,032,616
Total results (railway operating revenues)	6,045,338,100	6,045,338,100	6,473,240,973	6,034,640,528

Board of Economics and Engineering—Financial position of Class I roads for 12 months ending Aug. 31, 1921, etc.—Continued.

[Data from Interstate Commerce Commission advance statistics and Bureau of Railway Economies.]

Net railway operating income, class 1 railroads and large switching and terminal companies.	Twelve months ending Aug. 31, 1921. (1)	Wages equated on same basis as July and August. (2)	10 per cent increase in volume of freight only; wages equated on same basis as July and August. (3)	Forecast for 12 months ending Sept. 21, 1922; increase 5 per cent in volume of freight and decrease 5 per cent in freight rates; wages equated on same basis as July and August. (4)
Railway operating expenses	$5,161,760,829	$5,161,760,829	$5,161,760,829	$5,161,760,829
Less 10 months' effect of wage reduction, July 1, 1921	.....	304,166,660	304,166,660	304,166,660
Add for 10 per cent increase in volume	.....	.....	381,970,140	.....
Add for 5 per cent increase in volume	.....	.....	.....	190,985,070
Total result (railway operating expenses)	5,161,760,829	4,857,594,169	5,239,564,309	5,048,579,239
Net revenue from railway operation	883,577,271	1,187,743,931	1,233,676,664	986,061,289
Railway tax accruals	283,331,368	283,331,368	283,331,368	283,331,368
Uncollectible railway revenues	1,315,144	1,315,144	1,315,144	1,315,144
Railway operating income	598,930,759	903,097,419	949,030,152	701,414,777
Equipment rents net, Dr.	50,132,744	50,132,744	50,132,744	50,132,744
Joint facility rents net, Dr.	18,142,088	18,142,088	18,142,088	18,142,088
Net railway operating income	530,655,927	834,822,587	880,755,320	633,139,945
Operating ratio	85.3	80.3	80.9	83.7
Rate earned (annual basis) per cent on tentative valuation (Interstate Commerce Commission)	2.8	4.4	4.7	3.4
Tentative valuation (Interstate Commerce Commission)	18,599,000,000	18,599,000,000	18,599,000,000	18,599,000,000
6 per cent on tentative valuation	1,115,940,000	1,115,940,000	1,115,940,000	1,115,940,000
Would earn less than 6 per cent by	585,284,073	281,117,413	235,184,680	482,800,055
Would earn more than 6 per cent by	.....	.....	.....	.....
"Standard return" net railway operating income test period (class I roads and switching and terminal companies)	906,524,492	906,524,492	906,524,492	906,524,492

Mr. MOLITOR. Now, in that statement or table is contained the figures I have already given you, the actual figures of operating results for the year 1921. That, as I have stated, amounts to a net return of 3.2 per cent upon the tentative valuation.

Now, as of possible interest to the committee, we have figured what the result would have been had the wages of July 1, 1921, been in effect for the entire 12 months. That shows $834,822,587 as the net railway operating income, or 4.4 per cent upon the tentative valuation.

We have ventured to make an estimate or a forecast for the next 12 months. We have considered that the passenger revenue would remain, and the travel would remain about the same. We have figured that the volume of freight traffic handled would increase 5 per cent, and of course the result of the decreases in the wage pay roll made effective by the Labor Board on July 1 is figured in the operating expenses. The result of this is that the net railway operating income we estimate to be $633,139,945, or a return of only 3.4 per cent upon the tentative valuation.

Senator POINDEXTER (presiding). That includes an estimate upon the normal maintenance?

Mr. MOLITOR. That does not include the normal maintenance, for the reason that on a very low net operating income it is assumed that it will be impossible for the carriers to increase their maintenance what it ought to be.

Mr. WARFIELD. That does not include the last reduction, either?

Mr. MOLITOR. I am coming to that.

Mr. WARFIELD. I beg your pardon.

Mr. MOLITOR. Mr. Chairman, had the last 12 months' expenses been what we estimated they should be for the normal maintenance, it would decrease this net railway operating income by $225,000,000, or a total result of $408,000,000 of operating railway income, equivalent to only 2.2 per cent upon the tentative valuation.

At the time the estimate was made, a recently published decrease in rates on farm products, which the carriers in their statement estimated to amount to $55,000,000 per annum, was not taken into consideration so, as a matter of fact, the freight revenue in this statement is decreased by that $55,000,000, resulting in another subtraction of the amount of $408,000,000, amounting to approximately $350,000,000. And that, sir, seems to be the situation as we estimate it upon our revenue and analysis of the past 12 months.

Such a result for last year and our estimate for the next year brings us to the analysis of the past, we will say, 20 years, from 1900 to 1921. And I have here a comparison of ton-miles and passenger-miles with net railway operating income and investment account from the years 1900 to 1921, which I will, if I may, put in the record.

Senator POINDEXTER (presiding). It may be put in the record.

(The table referred to is on file with the committee.)

Mr. MOLITOR. This shows, in brief, an increase of ton-miles from $142,000,000,000 miles in 1900 to 414,000,000,000 miles in 1920 or an increase in freight of over 191 per cent.

Senator POINDEXTER (presiding). From 1900 to 1920?

Mr. MOLITOR. From 1900 to 1920. I have purposely left off the last six months, where the drop has come, in order to make the comparison prior to that.

Senator POINDEXTER (presiding). Has that increase been continuous throughout that period?

Mr. MOLITOR. It has, absolutely, sir. Now, the passenger business, as measured by the same period, has increased by 124 per cent, or approximately speaking, measuring all the business of the transportation plant, has practically doubled in those 20 years. Now, the net railway operating income has increased from 1900 to 1920, 66 per cent. The increase in the property investment from 1900 to 1920 has been about 100 per cent; that is, 1 per cent of 100 per cent. The diagram shows that in 1900 the carriers were receiving 4.78 per cent return on the property investment account of that period. In 1915 it was a little over 3 per cent. In 1920 it was 3.16 per cent. In other words, the additional investment in the property, amounting to approximately $10,000,000,000, only received a return of 3.16 per cent, whereas the $10,000,000,000 in the investment account prior to 1900 was receiving a return of 4.78 per cent

While the investment on June 30, 1900, was $10,263,000,000, I would prefer to take the similar figures for June 30, 1907, to show some results, because in 1907 the Interstate Commerce Commission put in certain rules and put them into effect with reference to railroad accounts which made it impossible that they should be anything but a return or accounting to the Interstate Commerce Commission in accordance with their own rules, so that since that period the investment accounts and the operating accounts have been accepted without any question. On June 30, 1907, the investment in road and equipment was $13,013,344,000. On December 31, 1920, the investment in road and equipment was $20,645,079,000. The net railway operating income on June 30, 1907, was $760,277,000; and on December 31, 1920, it had only increased to $794,000,000. The per cent of increase in the property account in those 13 years was 58.43 per cent; the increase in the net railway operating income was only 4.34 per cent.

Senator POINDEXTER (presiding). You say the increase was 4.34 per cent in the operating income; you do not mean net dividends?

Mr. MOLITOR. No; 4.34 per cent was the increase in the net railway operating income in 1920 over 1907.

Senator POINDEXTER (presiding). The gross?

Mr. MOLITOR. The gross. That is to say, that $33,723,000 was the increase in the operating income over 1907, whereas the increase in the investment account was $7,614,735,000.

This increase of $7,614,735,000 in the investment account was made up of $818,033,122 from the surplus, while $6,796,701,878 was obtained from actual new money invested in the properties.

Now, the return upon the increase of $7,614,000,000 was only four-tenths of 1 per cent. The return upon the new money invested, without regard to the surplus, was only five-tenths of 1 per cent.

Now, if it should be said that this should be compared with the basis of the standard return measured over the test period, it amounts to 1.92 per cent upon this return.

Chairman Clark, of the Interstate Commerce Commission, introduced testimony before the House Comm.ttee on Interstate and Foreign Commerce, on page 44 of the hearings of the discussion of House bill 4378, on July 15 to 22, 1919, a statement of the mileage, freight, traffic, investment, operating income, and surplus and other data relating to steam railroads of the United States for, I think, the period of 1900 to 1920. That is such good authority, Mr. Chairman, that we have used it for an analysis of certain additional factors; and we have brought it down to date—down to 1921—and have added some additional information which will be self-explanatory on the record and as to which I will not burden with the details.

Senator POINDEXTER (presiding). Do you desire to put that in the record?

Mr. MOLITOR. Yes, Senator; I would like to put it in the record.

Senator POINDEXTER (presiding). It may be placed in the record.

(The table referred to is as follows:)

Mileage, freight traffic, investment, operating income, and other data relating to steam railroads of the United States: 1900–1921.

Year ended—	Miles of road.[1]	Ton-miles of freight handled.[1]	Operating revenues.[1]	Operating expenses.[1]	Taxes.[1]	Operating income.[1]	Book cost of property.	Per cent of railway operating income to book cost.[2]	5½ per cent return on book cost.[2]	5½ per cent return on estimated valuation.[2 3]	Amount by which annual operating income failed to reach 5½ per cent on estimated valuation (accumulated).[2]
June 30—											
1900	193,346	141,599,000,000	$1,487,045,000	$961,429,000	$48,332,000	$477,284,000	$10,263,313,000	4.52	$564,000,000	$531,000,000	$53,716,000
1901	197,237	147,077,000,000	1,588,526,000	1,030,397,000	50,944,000	507,184,000	10,405,095,000	4.69	572,000,000	539,000,000	85,532,000
1902	202,472	157,289,000,000	1,726,380,000	1,116,249,000	54,465,000	555,666,000	10,658,321,000	5.02	586,000,000	531,000,000	80,866,000
1903	207,977	173,221,000,000	1,900,847,000	1,257,539,000	57,850,000	585,458,000	10,973,505,000	5.19	604,000,000	569,000,000	64,408,000
1904	213,904	174,522,000,000	1,975,174,000	1,338,896,000	61,696,000	574,581,000	11,511,537,000	4.83	633,000,000	596,000,000	85,827,000
1905	218,101	186,463,000,000	2,082,482,000	1,390,602,000	63,475,000	628,406,000	11,951,349,000	5.10	657,000,000	620,000,000	77,421,000
1906	224,363	215,818,000,000	2,325,765,000	1,536,877,000	74,786,000	714,102,000	12,420,288,000	5.58	683,000,000	644,000,000	7,319,000
1907	229,951	236,601,000,000	2,589,106,000	1,748,516,000	80,312,000	760,277,000	13,030,344,000	5.61	716,000,000	675,000,000	+77,958,000
1908	233,468	218,382,000,000	2,440,639,000	1,710,402,000	84,555,000	645,680,000	13,213,767,000	4.89	727,000,000	685,000,000	+38,638,00
1909	236,834	218,803,000	2,473,205,000	1,650,034,000	90,529,000	732,642,000	13,609,184,000	5.38	748,000,000	705,000,000	+ 66,280,000
1910	240,293	255,017,000	2,812,142,000	1,881,879,000	103,796,000	826,467,000	14,557,816,000	5.68	800,000,000	754,000,000	+ 138,747,000
1911	243,979	253,456,000	2,852,855,000	1,976,332,000	108,310,000	768,213,000	15,612,379,000	4.92	859,000,000	810,000,000	+ 96,960,000
1912	246,779	263,780,000	2,906,416,000	2,035,058,000	120,092,000	751,267,000	16,004,745,000	4.69	880,000,000	831,000,000	+ 17,227,000
1913	249,777	301,399,000	3,208,647,000	2,249,278,000	127,332,000	831,343,000	16,588,603,000	5.01	912,000,000	861,000,000	12,430,000
1914	252,105	288,320,000	3,126,520,000	2,279,408,000	140,532,000	705,883,000	17,153,786,000	4.12	943,000,000	890,000,000	196,547,000
1915	253,789	276,830,000	2,956,193,000	2,088,683,000	139,298,000	727,516,000	17,441,420,000	4.17	960,000,000	905,000,000	374,001,000
1916[4]	254,251	343,100,000	3,472,642,000	2,277,202,000	151,600,000	1,043,017,000	17,689,425,000	5.90	973,000,000	918,000,000	248,984,000
Dec. 31—											
1916[4]	254,037	365,772,000	3,691,065,000	2,426,251,000	163,451,000	1,100,545,000	17,842,777,000	6.17	982,000,000	926,000,000	74,439,000
1917	253,626	397,935,000	4,115,413,000	2,906,283,000	221,603,000	986,819,000	18,574,298,000	5.31	1,023,000,000	964,000,000	51,620,000
1918	253,529	408,474,000	4,984,547,000	4,047,787,000	229,729,000	682,547,000	18,984,756,000	3.59	1,045,000,000	985,000,000	354,075,000
1919	(5)	363,050,000	5,143,241,000	4,377,184,000	196,867,000	509,601,000	20,040,573,000	2.54	1,103,000,000	1,040,000,000	884,472,000
1920	(5)	413,616,000	6,178,388,000	5,831,465,000	271,911,000	102,550,000	20,645,079,000	0.50	1,139,000,000	1,072,000,000	1,853,922,000
Aug. 31, 1921	.....	344,770,000	.....	.....	.....	526,204,000	.....	2.55	.....	.....	.....

[1] Figures issued by Interstate Commerce Commission or Bureau of Railway Economics.
[2] Computed from recorded Interstate Commerce Commission and Bureau of Railway Economics figures.
[3] Valuation of railroads as of Dec. 31, 1919, estimated by Interstate Commerce Commission to be $18,900,000,000. Book cost on same date, $20,040,573,000. Percentage of former to latter (94 per cent) applied to book cost for each year to determine valuation as of that year.
[4] Income and surplus figures include overlap of six months in fiscal year ended June 30, 1916.
[5] Not available.

Year ended—	Book surplus at close of year.[1]	Amount by which annual operating income failed to reach 5½ per cent on book cost (accumulated).[2]	Annual property investment.[3]	Per cent of total for previous year.[3]	Annual mileage increase.[3]	Per cent of total for previous year.[3]	Ton-miles of freight per mile of road.[3]	Book cost of property per million ton-miles.[3]	Operating income per million ton-miles.[3]	Operating income per mile of line.[3]	5½ per cent on book cost per mile of line.[3]
June 30—											
1900	$271,929,000	$86,716,000	.....	.....	.....	.....	732,000	$72,400	$3,380	$2,470	$2,920
1901	352,721,000	151,532,000	$141,782,000	1.38	3,881	2.01	745,000	70,700	3,450	2,570	2,900
1902	433,914,000	181,866,000	253,226,000	2.43	5,235	2.65	776,000	67,700	3,530	2,740	2,900
1903	522,857,000	200,408,000	315,184,000	2.96	5,505	2.72	832,000	63,300	3,380	2,820	2,900
1904	551,479,000	258,827,000	538,032,000	4.91	5,927	2.85	816,000	65,900	3,290	2,680	2,960
1905	594,517,000	287,421,000	439,812,000	3.82	4,197	1.96	855,000	64,000	3,370	2,880	3,010
1906	636,391,000	256,319,000	468,939,000	3.93	6,262	2.87	963,000	57,500	3,310	3,180	3,040
1907	749,836,000	212,042,000	910,056,000	4.91	5,588	2.49	1,028,000	55,000	3,210	3,300	3,120
1908	745,504,000	293,362,000	183,422,000	1.41	3,517	1.53	935,000	60,400	2,950	2,770	3,110
1909	800,643,000	308,720,000	395,417,000	3.00	3,366	1.41	924,000	62,100	3,340	3,090	3,160
1910	1,371,108,000	282,253,000	948,633,000	6.97	3,459	1.46	1,060,000	57,100	3,240	3,430	3,330
1911	1,541,991,000	373,040,000	1,054,563,000	7.24	3,686	1.53	1,039,000	61,600	3,030	3,150	3,520
1912	1,583,032,000	501,773,000	392,366,000	2.51	2,800	1.15	1,068,000	60,700	2,850	3,040	3,560
1913	1,767,320,000	582,430,000	584,858,000	3.65	2,998	1.21	1,206,000	55,100	2,760	3,320	3,650
1914	1,648,596,000	819,547,000	565,182,000	3.41	2,328	.93	1,143,000	59,400	2,440	2,800	3,740
1915	1,556,787,000	1,052,001,000	287,635,000	1.68	1,684	.67	1,092,000	63,000	2,630	2,860	3,780
June 30, 1916	1,935,019,000	981,984,000	248,005,000	1.42	462	.13	1,348,000	51,600	3,040	4,100	3,820
Dec. 31—											
1916 [4]	2,159,769,000	863,439,000	[6] 306,702,000	1.73	[6] —436	—.17	1,440,000	48,800	3,010	4,320	3,860
1917	2,628,839,000	899,620,000	731,521,000	4.10	—411	—.17	1,568,000	46,700	2,480	3,890	4,030
1918	2,660,707,000	1,262,073,000	410,459,000	2.21	— 97	—.04	1,732,000	49,000	1,680	3,920	4,050
1919	2,594,478,000	1,855,472,000	1,055,816,000	5.55	(5)	(5)	.....	54,700	1,390	2,080	4,260
1920	2,786,561,000	2,891,922,000	604,506,000	3.02	(5)	(5)	.....	49,900	50	90	4,380

[6] Increment for six months doubled.
[7] Figures in italic indicate deficits.

Mr. MILITOR. This shows, on sheet 1 of this statement, that only in 5 years of the 20 years in question has the per cent of net operating railway income to the investment account exceeded 5½ per cent, namely, in the years 1906. 1907, 1910, and in 1916, and against December 31, 1916, because in 1916 the fiscal year was changed from June 30 to December 31.

Now. we have taken and shown upon the statement any excess, in the last column, the 5½ per cent return upon the estimated valuation instead of the investment account, estimating the valuation prior to 1920 on the basis of the percentage that the tentative valuation places by the Interstate Commerce Commission upon the carriers for the purpose of basing rates bore to the investment account of the carriers at that time, which was approximately 94 per cent; but we have carried that back so as to bring the valuation to 94 per cent of the book value. And it shows that had that basis been used that in only six years did the return as measured by the operating income amount to over 5½ per cent.

Now, sir, there has been something said in relation to the surplus, or the book surplus of the carriers, and I think, perhaps, it is in the record of the committee's proceedings. Book surplus is a pretty nebulous thing; it can not be stated in proper terms. It does not reflect many things that would indicate or show any actual cash results. These so-called booked surpluses at the end of 1920 had amounted, according, I think, to Mr. Thorne's statements, or some other witness—some witness that appeared before you—to two billion seven hundred and eighty-seven millions odd dollars. Now, that is a wholly incorrect practical statement of the surplus, as will be shown upon column 2 of page 2 of this statement, wherein we have shown the amount by which the annual operating income failed to reach 5½ per cent on the investment, and assume, I think perfectly properly, and I think you will agree with me that no surplus exists, unless there is more than 5½ per cent return, or about that, upon the investment account. We figured this a comulative matter, so as to compare with the book surplus, and we find that in December 31, 1920, this amount of annual operating income which failed reach 5½ per cent, and that which had been in excess of 5½ per cent, created a deficit of $2,891,922,000. But to have the same figures as to book surplus account shown by Mr. Thorne, or some other witness, I do not recollect who testified here.

Mr. JOHNSTON. And the deficit and relative surplus is accumulated only from 1900?

Mr. MOLITOR. Yes, sir.

Mr. JOHNSTON. You have not gone back to the book surplus as Mr. Thorne suggested, to 1890?

Mr. MOLITOR. We have not.

Mr. JOHNSTON. That would largely increase the earnings?

Mr. MOLITOR. It would.

Mr. WARFIELD. It seems to me those figures are very important, because one of the witnesses said that the carriers should use the surplus created in good years to carry them through the lean years. Now, if my memory is correct, this surplus accumulated is only about $891,000,000.

Mr. JOHNSTON. No; the amount taken from the surplus by certain carriers and passed into the property investment account.

Mr. WARFIELD. That is what I meant; that is the amount which was available, $800,000,000 is the amount which he discussed. Now, a large part of that surplus is not from earnings, but from the sale of securties, so that it is made up of two things. And it is largely made up that way, so it is not a question of surplus, as the witness by inference said, that it was made up of the rates. We will put the figures in the record. I do not know the figures now.

Mr. MOLITOR. The question of surplus may be looked at in another way, too, Mr. Chairman. I have here a little statement which I will mark "4-A" and put in the record, if I may, which shows the current liabilities, and net current assets, from June 30, 1915, to date, or rather to December 31, 1920. The current assets were above the current liabilities up to 1918, when, the next two years, they exceeded the assets a comparatively small amount, and then, in 1920, were above the liabilities.

But I would like to read the current assets, assuming that a complete liquidation would take place, and that this would be in effect their surplus. For the year ending June 30, 1915, it was, $120,696,000.

Now, the railway operating expenses for that year were $2,021,160,000. So that the net current assets, which is that surplus, would not run the railroads one month.

Without burdening you with the other figures, I will say that in 1916 the surplus of net current assets would not have run the railroads two months. That is in 1916, it would not have run them two months, and in 1917 an equal period, but in 1918 the liabilities exceeded the assets, and there would have been no surplus at all, even to run the railroads 24 hours. In 1920, the net current assets were sufficient to run the railroads 1.6 months.

Mr. WARFIELD. Without taking the time of the committee to read these tables, I think it would be a good idea to put them into the record.

Senator POINDEXTER (presiding). I think it would be a good idea, and the table just referred to may be placed in the record.

(The table last referred to is as follows:)

4-A.—*Working capital, Class I roads.*

[Hundreds omitted.]

Item.	June 30, 1915.	June 30, 1916.	Dec. 31, 1916.	Dec. 31, 1917.	Dec. 31, 1918.[1]	Dec. 31, 1919.[1]	Dec. 31, 1920.
Cash	$308,568	$434,098	$428,726	$341,696	$97,533	$125,108	$369,422
Demand loans and deposits	19,459	22,510	38,637	20,830	12,569	.....	.....
Time drafts and deposits	93,746	62,281	98,747	41,515	.....	.....	.....
Special deposits	40,374	68,792	67,915	99,520	51,632	.....	.....
Total	462,147	587,681	634,025	503,561	161,734	125,108	369,422
Current assets	1,038,816	1,290,681	1,409,792	1,563,131	821,382	985,720	2,520,128
Current liabilities	919,120	970,360	1,008,557	1,176,812	1,068,610	996,932	1,877,728
Net current assets	120,696	320,321	401,235	386,319	−247,228	−11,212	642,400
Railway operating expenses	2,021,160	2,210,893	2,357,398	2,829,325	[2] 3,971,870	[2] 4,377,184	4,885,277
Number months net current assets if converted into cash would pay operating expenses.	1	2	2	2	.....	.....	1.6

[1] Corporate and noncontrolled, excluding nonoperating companies.
[2] Federal and noncontrolled roads.

Mr. WARFIELD. It seems to me it would be a good idea to put in these various statements that Mr. Molitor has prepared.

Senator POINDEXTER (presiding). They may be presented for the record.

Mr. MOLITOR. I introduce a chart showing relatively the prices of farm products and wholesale prices of commodities to revenue per ton mile and other factors of railroad operation.

Senator POINDEXTER (presiding). That may be inserted in the record.

(The chart referred to is on file with the committee.)

Mr. MOLITOR. And also a table or chart showing the relation of railroad compensation, cost of living, and net operating income.

Senator POINDEXTER (presiding). That may be inserted in the record.

(The chart referred to is on file with the committee.)

Senator POINDEXTER (presiding). Now, if you have any further oral statement to make, I would like you to make it and then arrange with the reporter afterwards to put in the papers that you desire to put in.

Mr. MOLITOR. I don't think there is anything more in the way of an oral statement. These statements that I have made orally were in an endeavor to explain these amounts and the figures.

Senator POINDEXTER (presiding). If you have any further explanations to make we will be glad to hear them.

Mr. MOLITOR. Thank you. I think I have finished.

Senator POINDEXTER (presiding). Then the committee will stand on recess until 10 o'clock to-morrow morning in this room.

(Whereupon, at 1.20 p. m., the committee adjourned until Wednesday, November 23, 1921, at 10 o'clock a. m.

MODIFICATION OF TRANSPORTATION ACT 1920.

WEDNESDAY, NOVEMBER 23, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment on yesterday, at 10 o'clock a. m. in the hearing room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. We will proceed.

Mr. WARFIELD. Mr. Johnston will go on if satisfactory to the committee and will close for the securities' owners on this subject.

The CHAIRMAN. State your name, residence, and connection with this subject, Mr. Johnston.

STATEMENT OF MR. FORNEY JOHNSTON, OF COUNSEL FOR THE NATIONAL ASSOCIATION OF OWNERS OF RAILROAD SECURITIES, WASHINGTON, D. C.

Mr. JOHNSTON. My name is Forney Johnston, and my residence is Birmingham. A large part of my time is spent here in connection with liquidation of Federal control of railroads. I appear to-day as of counsel for the National Association of Owners of Railroad Securities.

Mr. Chairman and gentlemen of the committee, our purpose in appearing in opposition to the proposed changes in the transportation act is in line with the general objectives which the association of security holders has sought to accomplish for some time, or to be of some assistance in accomplishing. It is not merely that an amendment to the transportation act would have a bad psychological effect as a step backward in the general constructive progress which began with the investigations before this and the joint committee several years ago; it is very much more than that. It is a realization that no additional burden can be thrown on the railroads during this period of rehabilitation without bringing about a very grave situation. For that reason Col. Molitor, chairman of the board of economics and engineering of the association, gave a brief outline of the existing and the prospective situation of the railroads. I will not quote his figures. In substance it is that, assuming that an increased tonnage amounting to 5 per cent in one estimate and assuming an increase in tonnage of 10 per cent in another estimate, even with these assumed increases in tonnage, the railroads of this country would realize a net railway operating income of less than two (2) per cent on their book or tentative value for the next 12 months if we assume the conditions which now exist will continue to exist; and therefore we think the situation is so exceptionally serious, notwithstanding the constructive efforts on the part of all parties to the equation, that no added burden should be thrown on the railways, and that if any added burden is thrown on the railway situation it will put this question before this committee in a very different light from that which it even now occupies. And it must be recalled that if the Congress has to take the final step in this situation it must assume the entire burden of taking over these properties, and that the States, which are now unnecessarily exercised, will not be directly burdened with the problem. The burden is that of the Congress if that which appears well within the range of possibility does actually take place, and it is from that standpoint that we appear here, with every desire to be helpful and recognizing quite as distinct a responsibility on the part of the management and of the ownership of railroads as that which rests upon the regulatory agencies. My statement will be confined to what I consider the specific problem before this committee as the chairman has repeatedly stated it.

But before entering upon that, and as a necessary preface, I would like to make one or two references to suggestions which appear on this record, such as those of Mr. Thorne, that the present act and the basis of rate making, the theory of revenue consideration, which has been advanced to a position of primary importance rather than as a remote check upon the rate-making function—and hitherto as of entirely secondary importance, as I shall attempt to show—is an extraordinary step, which is, to quote Mr. Thorne, unwarranted and against the course of all economic laws.

I think one answer to that suggestion is that after studying this problem for 18 months longer than the American Congress, and in the light of their own experiences, which present problems quite as difficult as those which surround us, although more limited in scope, the British Parliament has enacted a railway act, in which they adopt the principle of the American act in all of its essential particulars with reference to adjustments of the rate structure to the revenue necessities of the carriers. They have, of course, less difficulty in that matter under the British constitution, because Parliament has very much wider powers. For that reason whereas we were forced to adopt, and properly, I think, without reference to the Constitution, a permissive basis of consolidations, the British make it obligatory. It is permissive for a period of, I think, 18 months after the act became effective, and then if the carriers do not perfect the system of amalgamations proposed by the British bill, the amalgamation commission, which is created, puts it into effect. But the point I wish to refer to particularly in view of what seems to' us a criticism based upon a complete misunderstanding of the transportation act, is that the rate-making provisions of the British act are in all essential particulars from a revenue standpoint in line with our own. They are brief. I have excerpted them from the British act, and because of their importance as a piece of contemporary legislation by the British Government, I would like to file them in the record.

The CHAIRMAN. Is it a copy of the British act?

Mr. JOHNSTON. Of the rate-making provision. It is merely a few pages.

The CHAIRMAN. And put in the provisions for consolidation also.

Mr. JOHNSTON. I will be very glad to do that.

The CHAIRMAN. I should like to have both put into the record.

Mr. JOHNSTON. If the chairman would prefer I will take the British act and eliminate those provisions which have no bearing upon our situation at all and put in the amalgamation and rate making and other related provisions.

(The provisions of the act of the British Parliament referred to will be found immediately following the statement of Mr. Johnston.)

Mr. JOHNSTON. It is true also that they have adopted in quite a striking way, adapted, of course, to British conditions, the wage provisions of the transportation act. So, I think in return for the compliment done the British Government by the Congress in the adoption of the commerce act in 1887, when we took over bodily sections 2 and 3, and I think, materially, section 1, they have recognized in a somewhat striking way the constructive work that our Congress has done and have tried to adapt it to their most difficult conditions. The difference, of course, in adopting a standard for rate making is that whereas our standard is necessarily fixed by the Constitution on the basis of a reasonable return upon the fair value of the property devoted to the public service, the Parliament having arbitrary power can employ any basis deemed reasonable and consistent with sound economics and has, accordingly, taken the standard rental during the war as the rate basis. That is to say, they have adopted the standard rental paid during British control as the revenue base to which the carriers are entitled to adjust rates for the service of transportation rendered by the railways as they stood when taken over by the Government, to which is to be added what I interpret to be the going rate of interest on additions and betterments not reflected in the earnings on which the standard war rental was based. Provision is made for a gradual and progressive advance in the rate base over the standard rental thus adjusted for added property, and also (sec. 58-1) for an immediate allowance up to 33⅓ per cent of all savings which may be brought about by coordination, in advance of the contemplated amalgamations.

So, in requiring the carriers within a certain period after the effective date of the act to initiate and file a system of rates which will produce the standard return, they have adopted in all its substantial outline the underlying revenue considerations of our act, which have been brought into the statute by section 15a.

Now, gentlemen of the committee, one suggestion as to the attack upon the theory of——

The CHAIRMAN (interposing). Just a moment there. You do not mean to say, I assume, although it might be susceptible of that interpretation, that so far as the consolidation of railroads is concerned we have less power than the British Parliament?

Mr. JOHNSTON. Well, I think it amounts to that, Senator. We have no direct power to require consolidation of existing companies; that is, the Congress has no direct power to——

The CHAIRMAN (interposing). We have the right to regulate commerce among the States. That is complete and plenary. If that requires consolidation of railroads we have just as much power as the British Parliament.

Mr. JOHNSTON. I agree with you as to that, Mr. Chairman.

The CHAIRMAN. As to consolidation I mean. I am not now speaking about the protection of the Constitution in return upon capital investment.

Mr. JOHNSTON. Yes; but, Senator, is there not very serious doubt upon the proposition that consolidation can be enforced upon two carriers, which are otherwise discharging their functions, the functions which they have undertaken in serving the public, or that they can be required to effect an actual physical consolidation of the existing properties?

The CHAIRMAN. We may not be able to do it just in the way the British Parliament did, but we can accomplish it just as thoroughly as the British are accomplishing it in another way.

Mr. JOHNSTON. Through the process of condemnation?

The CHAIRMAN. It might involve condemnation.

Mr. JOHNSTON. I think undoubtedly the Congress has the power to create corporations with authority to acquire all the underlying constituent members, and the result would be the same, assuming that the condemnor company could pay the award in cash. But in view of the chairman's frequently stated opinion, for which we have, of course, the profoundest respect, that these consolidations will solve the question of diversity of earnings, I would like to call attention to a different theory of the British act. Their basis of consolidation is territorial. They have abandoned to that extent the principle which we have sought to perpetuate, that after the consolidations contemplated by our act there must be preserved this element of territorial competition. Now, the British Government has actually solved this question of diversity in earning power between competing lines by consolidating all within the territory into a single company, and none of those questions will arise, our thought being that even with consolidation, such as is proposed by the Interstate Commerce Commission in the hearing now pending, there would still occur that same diversity of return, either at the outset or it would develop with the changing development of the country, and this question of surplus, which so much worries our friend, Mr. Thorne, in this situation would again call for some sort of treatment such as section 15a puts into effect in a practical way, for the adjustment of the rate structure to the reasonable necessities of different competing carriers.

The CHAIRMAN. There may be a difference of opinion—and there is room for a difference of opinion—as to whether consolidation should take place territorially or through competitive systems. That is a question upon which men may differ and very easily differ, but that does not affect the power of the Congress to bring about such consolidations as the Congress may believe are necessary to enable it to put into effect an effective system of regulation of commerce among the States.

Mr. JOHNSTON. We do not deny nor do we doubt the power to accomplish that in one way or another. My doubt is merely as to enforced consolidation of the existing organizations. I see no power to accomplish that directly, for Congress has no power to exclude persons or agencies not inherently vicious or harmful from interstate commerce; and I see formidable, if not insuperable, difficulties against the accomplishment of that result indirectly—except perhaps after great delay and profound confusion unless accompanied by Federal taking and control during the period of compulsory consolidation. It is for that reason that, pending the working out of that very difficult question under our constitutional system, the association has left that all the practical benefits of consolidation, through the grouping of carriers and through the exercise of those economies and coordinations which is the first declaratory principle in the British act, should be brought as far as possible through better coordination of the railroads themselves, as suggested to this committee by the association. Because of the dangers and difficulties incident to the process, the principle of enforced con-

solidations is one as to which the present attitude of the assoc'ation is one of opposition. I do not mean combative opposition, but their theory is that it is so remote from a legal standpoint and the mechan'cal d'fficu.ties which surround it, that other more immediate expedients are obligatory in order to work out our situation.

Speaking of the surplus, and I think it is an important factor in th's situation, because I think, Mr. Chairman, the committees of the Congress and yourself have had, I might say, some sympathy for the position of those who complained of the practice of capitalizing an unregulated surplus, that prob'em was repeatedly advanced by Mr. Thorne, not only in his testimony on this hearing; but reference back to the consideration by the committee of the Federal control bill will show that the question of surplus was the Banquo's ghost that appeared then, as it has at all comm ttee hear ngs involving a general discussion of the railway problem. His proposition is to el minate section 15a, which is the only practical formula which has ever been proposed to accomplish the result urged by those who object to the unregulated surplus or who ns st that an operating surplus out of relation to the necessities and reasonable returns of particular carriers should not be considered as a vested property right. We entertain no possible doubt that under our constitutional system any surplus from operations perm'tted and earned and plowed into the property in accordance with existing law is as absolutely the property of the carrier as if produced from outs de sources. We have no more doubt that the Congress can now enact legislation, as it has in section 15a, which w'll work out effective regulation and control of that surplus, in excess of a fair return, but it wi'l be operative not over past surpluses but only over surplus realized after the legislation 's put upon the statute books.

That we think was recognized in the Sink'ng Fund cases in which the Congress had plenary power over the subject matter. That case involved legislation affecting the disposition or applicat on of the earnings of the Union Pacific. The Congress, not only through its control over interstate commerce but through its reserved power to amend the charter of the Union Pacific, control.ed the situation.

The question involved was the power of Congress to require the establishment in the Treasury of the United States of a sinking fund to be invested by the Secretary of the Treasury in bonds of the United States, and to be built up by covering into the fund 5 per cent of the company's net earnings required to be paid to the United States by the act of July 1, 1862, incorporating the Union Pacific; also one-half of the compensation payable from the United States to the Union Pacific from time to time for transportation services, and in addition thereto out of the general assets of the company, a sum sufficient to aggregate with the above mentioned items 25 per cent of the whole net earnings of the railroad for the preceding calendar year. The court had no difficulty in reaching the conclusion that as to the earnings of the company realized after the passage of the act, the power of Congress was abundant, but Chief Justice Waite, who wrote the opinion of the court, was careful to point out that the United States was as much bound as an individual to respect property acquired under lawful statutes, aptly observing that "they (the United States) can not legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of this railroad." (Sinking Fund cases, 99 U. S., 700 (719).) Surplus lawfully earned, subject to no trusts or conditions, unaccompanied by the clear-cut provisions of section 15a for the adjustment of the rate structure to the reasonable and constitutional requirements of the carriers in competitive groups, is as much the vested property of the carrier as land or rihgt of way donated by the public. It may be conceded that public authority might have restricted earnings so that the full amount of the surplus would not have been realized. The point is that it did not exert the power.

So that problem would be perpetually unsolved if this committee should accede to Mr. Thorne's request and strike out section 15a—strike it from the act. There is no disposition of that problem suggested by Mr. Thorne. He merely asserts that it is a perpetual question, and he makes an appeal to this committee to do something about it when the committee has already done something about it that is constructive, wholly adequate and antagonistic to his recommendation that the committee undo its work.

I think it is rather remarkable that Mr. Thorne should make this recommendation when he appeared before this committee during the discussion of the Federal control bill and urged that the compensation to be paid to carriers during

Federal control should involve a division of the surplus, the half not left to the carriers earning a surplus to be taken by the Federal Government to pay compensation to those carriers who did not earn a surplus, and going very much further in that direction than the principle of section 15a.

The other suggestion of Mr. Thorne's, and an impossible one, that the accumulated surpluses of these carriers, which he said had increased, approximately, to the sum of $2,900,000,000 since 1890, approximately the date of interstate regulation under the commerce act, should be a sufficient resource to tide the carriers over these adverse conditions—as if that surplus were a revenue surplus, as if it were a surplus available to carriers which did not earn it, or as if it represented anything more than a suspension of dividends.

Of course, a surplus plowed in or earned by the Union Pacific Railroad or the Lackawanna Railroad, how can it sustain carriers which did not earn it? This aggregate surplus is built up of all plusses. It takes into consideration none of the deficits under a fair and reasonable return. That deficit, taking the railroads as a whole, has been accumulating for years, and as Col. Molitor showed in his figures on yesterday, if we had taken 5½ per cent as a reasonable return and had begun with the year 1900, not going back to 1890, and had accumulated the net deficits under the 5½ per cent return, based on the property-investment account, corrected according to the factor of error which the Interstate Commerce Commission has tentatively found to have been present December 31, 1920, why the accumulated deficit under a 5½ per cent return in net railway operating income for that period of 20 years only would be $2,900,000,000, approximately what the apparent surplus is according to Mr. Thorne's contention. We get fine results if we add our plusses and ignore our minuses. Of course, that suggestion entirely ignores the necessity of the other carriers and the necessity of the other group which realized no surplus except by suspending dividends, as well as the sound theory that transportation must be viewed as a whole and sustained as a whole. The fallacy is so obvious as to warrant no attention as a possible source of assistance to the carriers during the pending crisis.

One other suggestion before I confine myself to what I conceive to be the immediate issue here—that is, as to this basis of grouping which they are attacking. And in support of that they have filed an opinion of Judge Hughes, for whose opinions we all have the greatest respect, suggesting among other things that the principle of grouping is unconstitutional, for the reason that each individual shipper has the right to insist that the value of the service to him shall be the test of reasonableness of the rate, and that grouping displaces this test by bringing other factors into consideration, and is therefore beyond the power of the Congress as depriving the shipper of some imagined constitutional right. The fact is, of course, that the right to a reasonable rate is nothing but a common-law right. It is not any right at all as far as the commerce clause of our Constitution is concerned, because that is affirmative and plenary. And even if it were a common-law right—and there is no constitutioanal or vested interest in any common-law right—it would not approach the dignity of a constitutional right under our Constitution. That was determined in Munn *v.* Illinois, and to say that any individual shipper has a constitutional right to object to the basis of grouping would be merely equivalent to the simliar fallacious suggestion made to take only two instances by the railroads—that they had a common-law right in the doctrine of master and servant, and that they had a common-law right that was infringed by the Adamson Act; or that they had a common-law right to initiate exclusively their own rates.

The whole process of regulation involves some infringement of or derogation of common-law rights, otherwise there would be no necessity for statute or for regulation at all.

The principle of grouping which our friends now attack as unconstitutional has been frequently sustained without any suggestion of lack of power on the part of the commission. The entire soundness of the practice is pertinently illustrated in the Spokane case, where two railroads, one with a low operating cost and the other built under different conditions and with a higher operating cost, had their competitive rates before the commission. Spokane insisted that its citizens had the right to have competitive rates for those carriers fixed on the basis of lowest cost. Of course, the commission asserted that the public interest was involved and that to limit the competitive rate to that which would produce a reasonable profit on the service of the road most advantageously situated would have the effect of drying up the other road; and they fixed

the rate at some intermediate point, a rate that took into proper consideration the status of the least favorably situated of the two competing lines.

Well, now, if the shipper had the absolute right to any such principle as is now urged against group consideration, it was violated then and it has been violated in every zoning controversy in which the doctrine of group rate making has been put into effect. Furthermore, it would be absolutely violated by consolidation of railroads, because consolidation is nothing but group rate making made absolute.

That may be illustrated, for instance, in this way: Suppose it were the proposal of the Congress or the commission to authorize the consolidation of the Pittsburgh & Lake Erie with a very high earning power, or high ratio of earnings, on the value of its property, because it is a line that clears a very heavy volume of traffic; it does not originate so much traffic, but is a line so strategically located that it has a large tonnage; suppose it were allowed to consolidate with some weaker carrier, such as the Wheeling & Lake Erie—with a weaker earning power I mean—that consolidation would enable the consolidated company to insist upon a fair and reasonable return upon the value of its investment, and would necessarily crystallize the principle of grouping into the consolidation itself. While we say that the Congress can not compel directly physical consolidation of existing companies, the permissive consolidations contemplated by the transportation act, it will have some tendency toward that end. Every consolidation involves some grouping made permanent. They say it is unsound and unconstitutional. If so, the whole proposition of this committee to iron out the situation gradually by authorizing consolidations must be given up.

We think that this attack upon the basis of group rate making involves singularly a fundamental misconception of the public interest. The right to regulate is based upon public interest, not on that of any particular shipper; and the public interest is not that of any particular individual, and it may not be of any two individuals or of any particular community, but may be the Nation as a whole. The public interest, which is to be subserved, is not derived from the common-law right of the individual to have a reasonable rate; on the contrary, the individual's common-law right to a reasonable rate is derived from the public interest which affects that enterprise, and, therefore, subjects it to regulation by the Congress or by the State under their reserved power. Of course, the power of regulation by Congress is not derivative or based upon the right of the Government to compel the discharge by carriers of a duty assumed to the public. It springs from the affirmative provisions of the commerce clause of the Federal Constitution, without falling back upon any police power, but exists directly and entirely by virtue of the declaration itself. It is not a police regulation, but an affirmative power vested in the Congress.

So we have the attack on the grouping theory of section 15a—upon the disposition of the surplus which is worked out under section 15a. The principles and the other considerations which underlie them are the only processes which will solve the complaints of some of our friends who are here asking repeal. And if they would understand this section or study it with sufficient understanding to realize the importance of the public uses which the section was expected to fulfill, I believe that a very large part of the old animosities which seemed so happily disposed of at the time of Ex parte 74, the first functioning of the Interstate Commerce Commission under this transportation act, would disappear.

It is a singular thing that at that time all recognized that the necessity for a general advance in rates was not chargeable to any destructive provisions of the transportation act, or objectionable provisions of that act, but that a major advance was necessary because of the policy of the Railroad Administration. This was expressed by Mr. Walker D. Hines in his final report of the operations of the railroads by the Government to the President, in which it was stated that by reason of the discretionary policy exercised by the administration in holding rates to a subnormal relation to the cost of operations it would of necessity be required that rates should be advanced immediately on the termination of Federal control. It was asserted that the Railroad Administration had not made a second advance in rates, because even if it had brought the rate level up to the proper relationship to the cost of operations, inasmuch as they had discontinued service and effected economies in operation under the Railroad Administration, as he conceived, that even with rates adjusted to the cost of Federal operations and rental an additional rate advance would be necessary to take care of the situation of private operation. The report asserts that the

Railroad Administration conceived that it was better policy that there should be one extraordinary rate adjustment at the termination of Federal control than that there should be two with their disturbing effect. Of course that policy resulted in throwing an impossible burden upon the railroads who were confronted with the necessity of making one unparalleled advance instead of having the administration adjust rates upward during the period of high pressure and high profits and leaving those rates at the push off of private ownership with a proper relationship to cost of operations.

And when it is seen that this policy of the Director General extended also to the relationship of wages to private operation it is clearly seen that the railroads were confronted with an impossible task at a critical time. I do not state that in criticism of the Railroad Administration. It is merely a fact that was recognized by the Railroad Administration, and very much, as I conceive, against what this committee thought was likely to be the result of the Federal control act, as was made very clearly plain when Commissioner, now Judge, Anderson was explaining the provisions of the Federal control act as formulated by himself and others, by which the rate-making power was reserved to the President without any review by the Interstate Commerce Commission and without any reference to the ordinary considerations which prior to the transportation act entered into the process of rate making. Senator Watson asked him if that meant that the President should be given unrestricted power to adjust rates, and he said, "Yes; that in view of the Federal operations that that was obligatory. And then that in his opinion it would be the duty of the President, following out that act, to keep rates in a proper relationship to cost of operation, so that there would be no deficit. Of course that was not binding; it was merely the expression of an opinion; but it shows that the policy of breaking down every sound relationship in railway operations between rates, wages, and cost of transportation was not dreamed of when the Federal control act was formulated or when the carriers agreed on their compensation under the standard contract.

The contrary public policy, which was afterwards adopted, in the exercise of discretion, exercised, I have no doubt, in the greatest good faith, was the direct cause of an extraordinary situation, resulting from Federal operation and not from the transportation act.

The reference to the report of the director general, which recognized these consequences, and the specific colloquy between Senator Watson and Commissioner Anderson with reference to that situation, I have reduced to a brief excerpt, with a brief additional comment of my own, and I would be glad to read it at this point, if acceptable to the committee, as illustrating our thought.

The CHAIRMAN. You may proceed.

Mr. JOHNSTON (reading):

RADICAL AND HORIZONTAL RATE INCREASES FORCED BY RATE POLICY OF DIRECTOR GENERAL FORMED AFTER ADOPTION OF FEDERAL CONTROL ACT.

That the Federal control act gave to the President unrestricted power to maintain a proper relationship between rates and cost of operations was made plain in Northern Pacific Railway *v.* North Dakota (250 U. S., 135, 150).

That it was expected that this power was to be freely exerted by the President to attain the result stated was emphatically asserted by the author of the Federal control act in the Senate hearings upon that measure:

"Senator WATSON. And the power to manage these railroads is managerial—it is administrative. Now, is there some particular reason why the Interstate Commerce Commission can not discharge its duties as a general legislative body and determine these rates?

"Commissioner ANDERSON. In time of war; yes. The President is responsible for financial results. He is responsible for rates over new routes. He is responsible for rates which are being made on substantially different theories from those which have hitherto controlled. * * *

"Senator WATSON. In other words, you claim if he wants more money to increase the revenues in the operation of railroads, he could raise the rate?

"Commissioner ANDERSON. Yes; he could. If he found the railroads were not self-supporting, in my opinion, it would be the duty of the President to make them self-supporting." (P. 1290.)

That the Federal control act was understood by the director general as contemplated the initiation of increased rates by the President for the purpose of paying the expenses and rental of the railroads and that the director general

was urged to increase rates so that the properties would be self-sustaining when turned back to private control is a matter of record.

The comment of the Director General is as follows:

"Considering the wholly abnormal character of results during most of 1919, the consequent unreliability of these results as a basis for the general rate increase, and the great business embarrassments which would result from an unnecessary additional general rate adjustment, it was clearly in the public interest to avoid such a disturbing influence in a period already filled with disturbing influences, even though it was necessary in consequence to draw temporarily on the Treasury for a portion of the cost of operation. This course was adopted because clearly in the public interest and notwithstanding the fact it was appreciated that the resulting deficit in railroad operations would be mistakenly regarded as a 'loss' to a much greater extent than if exactly the same total cost had been paid for through increased rates instead of through appropriations from the Treasury.

"At one time the railroad corporations urged that these general rate increases ought to be made so that the properties would be self-sustaining at the time they were turned back to private control. The reasons above stated constituted sufficient reasons against rate increases during the rapidly changed period of readjustment in 1919. But an additional reason of great importance was that the Federal control act contemplated the initiation of increased rates by the President for the purpose of paying the expenses and rental of the railroads 'under a unified and coordinated national control and not in competition.' It was believed by the director general that any increase necessary to meet the expenses and rental during unified control would have been much less than would be necessary to give adequate earning capacity to the various railroads and the necessary credit to the various railroad companies when operating on their own responsibility and in competition. Hence, if increases in rates had been made during 1919 and in effort to cover the rental and the entire operating expenses, this would not have obviated the necessity for a still further general rate adjustment upon the expiration of Federal control. Clearly it was much more in the public interest to have one general rate adjustment for the purposes of private control than to have, in addition, an intermediate one for the purposes of Federal control.

"The foregoing reasons caused the Railroad Administration to adhere to the view that there ought not to be a second increase in rates during the brief period of Federal control, and the failure to make this second increase in rates is the reason for what has been so generally described as the 'loss' and as the cost of Federal control as compared with private control." (Report to the President by Director General of Railroads, dated Feb. 28, 1921, pp. 27, 28.)

Now, Mr. Chairman, it is the status which has been brought about by section 15a and its necessary relation to the other problem, which is the more important one before this committee. I do not mean to take issue with Mr. Clark, nor with any of the other witnesses here, who have stated that in a general way section 15a was merely writing into the act the present provisions of the Constitution as to a reasonable rate of return, or the further statement that in the past the Interstate Commerce Commission has given consideration to the general principles asserted in section 15a. But I do insist that what has been a secondary and remote consideration, without any affirmative rights to the carrier, whose only status prior to the adoption of section 15a was that of a defendant—I do insist that the adoption of section 15a first advanced those principles to one of primary or first-line importance. It has transposed the process of regulation and has expanded it from one involving a mere consideration of individual rates by the addition of a dual factor—a check or a test basis on the result, which has added the element of certainty referred to in the Knoxville case to that of prophecy, which is the case when individual rates alone, unaided by the test of return, are primarily the only consideration.

A brief review of the history of general advances prior to section 15a and of the undoubted purposes of Congress in adopting the transportation act will clearly demonstrate the correctness of that contention.

In the first place, the interstate commerce act, in section 1, referring to reasonable rates and giving the Interstate Commerce Commission jurisdiction over reasonable rates, limited as it was at the outset, gave no consideration whatever to the possibility of the necessity for relief from an unreasonably low rate.

One of the earliest proceedings under the interstate commerce act was brought by the Chicago, St. Paul & Kansas City Railroad, protesting against an unreasonably low rate which was maintained by the Burlington Railroad, which

forced it to make low rates into Chicago below that which it could make and survive, and would throw an undue burden on the local rates.

The opinion of the commission was written by Judge Cooley. The Burlington in that case took the position that its method of handling its rates was a matter of its own concern; that it was more favorably situated than its competitors; and that it had a right to take advantage of that situation if it saw fit. And Judge Cooley, in an opinion of remarkable clarity, pointed out that it was not the purpose of the commerce act to protect carriers against each other or to protect their revenue, but it was for the purpose of preventing extortion and removing discrimination as between persons and localities, and that the only remedy for the carriers in a situation of that sort was to exercise a consideration for each other's necessities, and the plain suggestion was thrown out that it lay in the cultivation of proper relations between themselves.

Now, Judge Cooley did not invite them to fix rates by agreement, but the expression which he did use was:

"Their relief must be found chiefly in prudent management; in the cultivation of reasonable relations among themselves; in mutual forbearance; and the application of a sense of justice to their mutual dealings and in their rivalries."

That was shortly after the adoption of the act in 1887. Now, they did just that. Nineteen carriers west of the Missouri River formed a joint traffic association, and 31 carriers east of the Mississippi River did the same thing. The basis of those agreements, so far as the expressed statements went, was that they were intended to accomplish just what Judge Cooley had asserted; to prevent destructive competition; to insure a reasonable rate structure; and they began to function under them.

And, of course, when the Sherman Act was adopted in 1890 the United States immediately instituted injunction proceedings, and the Supreme Court asserted that any interference with a free and open competition and free and independent functioning of the carriers in their power to create rates was a combination in restraint of trade and in violation of the Sherman Act. And the only relief to the carriers for the maintenance of revenue and its protection from subnormal rates which Judge Cooley could point out, to which I have referred, was thus declared illegal, and that is the law to-day.

I say without fear of successful contradiction that 75 per cent of the freight revenue of important trunk-line carriers is competitive, and it is impossible for them to advance simultaneously these competitive rates to meet advancing costs without being met with the charge that they are acting in concert in violation of the Sherman Act forbidding a combination, and this entire remedy is provided by section 15a of the transportation act.

The CHAIRMAN. It should be remembered that when Judge Cooley delivered that opinion the Interstate Commerce Commission had no power to make any rates.

Mr. JOHNSTON. Certainly, sir. But that case involved a fourth section hearing, and if the commission had held any jurisdiction over that factor of unreasonably low rates it would have afforded some measure of relief in that proceeding. And, of course, the United States Supreme Court approved in the fullest sense the observations of Judge Cooley by its decision in the Cincinnati, New Orleans & Texas Pacific case, in which the court held that the commission had no power to make rates, but the court there approved the observations of Judge Cooley, to the effect that the commerce act was not intended to protect carriers from subnormal and even destructive rate structures resulting from competition.

As concisely asserting the principles I am now discussing, I present and read the following:

ORIGINAL PURPOSE OF INTERSTATE COMMERCE ACT TO RESTRAIN CARRIERS NOT TO CONSERVE THEIR REVENUE.

In I. C. C. *v.* C., N. O. & T. P. Ry. Co. (167 U. S., 479), (494), the court said:

"Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might

leave with the companies the right to fix rates, subject to regulations and restrictions. Well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so." (494.)

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act, but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act." (499.)

COMMERCE ACT NOT ADOPTED TO PREVENT UNREASONABLY LOW RATES.

In C., St. P. & K. C. Ry. Co. case (2 I. C. C., 137), it was vigorously insisted that the commission should exercise its jurisdiction to denounce the inadequate rates proposed by a competitor, the Burlington.

Counsel for the Burlington asserted, as appears from the opinion of Judge Cooley (p. 143), the following contention:

"We claim," he said, "that it can carry freight less than the other lines, and we claim that it has a right to carry freight at any figure it pleases, and that it has a right to compete on its own basis. Nobody complains against it; but Mr. Stickney comes and says that this road is doing its business too low. It seems to us that this road has a right under the law to fix its own rates, and that it should not be called upon to show that its rates are not remunerative to itself or such that these other roads can not meet. Now, that is the question before this commission."

Judge Cooley proceeded as follows:

"In the same connection something was said by counsel about the right of 'survival of the fittest,' but without explanation of the designed application in the case. Whether it was meant that the Chicago, Burlington & Northern, having, by reason of its more favorable gradients and curvatures, the power to destroy its rivals in a life-and-death struggle might rightfully do so, was left to conjecture."

In the case cited—Chicago, St. Paul & Kansas City Ry. Co. (2 I. C. C., 137) (146)—the commission said:

"This question of authority, now for the first time presented to the commission, is raised upon the express words of the statute, which declare that 'all charges shall be reasonable and just.' To be so the charges ought to be fair to both parties—to the carrier as well as to the party it serves; the rights and interests of both should be considered. There is consequently no little force in the claim made by respondent that charges are not reasonable and just when they are so low as to be unremunerative to the carrier—so low that its action in continuing to make them would lead directly to bankruptcy. Possibly, if the statute were to be interpreted without any aid from its hitsory, and with no other knowledge of its purposes, aims, and ends that such as may be derived from its provisions, a holding that a rate unreasonably low was forbidden might be justified, or at least might be urged upon plausible arguments.

"But every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public hisory nothing can be more notorious than that the act to regulate commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for its service, should have the benefits which the law had undertaken to give, but of which in very many cases it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other.

"The act does, indeed, require them to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines; but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public, be wronged by arbitrary conduct, or by favoritism, or be subjected to extortion. It is to this end that the

act declares that all charges made by the carriers it regulates shall be reasonable and just; and the purpose of the declaration is to establish the rule that the charges shall not be extortionate.

"If such was the primary purpose of the statute, as unquestionably it was, then the proper meaning of the term 'just and reasonable,' as employed in it, is apparent. They were employed to establish a maximum limitation for the protection of the public, not a minimum limitation for the protection of reckless carriers against their own action. That a minimum limitaton was not in the mind of Congress we may easily satisfy ourselves by considering what would have been the probable fate of any distinct proposition to confer upon the commission the power which it is now urged to assume. There is not the least reason to suppose that any such proposition would have been seriously entertained in Congress or that it could have received any considerable support.

"It would, on the other hand, in all probability have been promptly rejected as wholly unnecessary for the protection of those who had complete powers of protection in their own hands, and as being little short of impertinent intermeddling. If such would have been the fate of the proposition expressed in plain terms, then the conclusion is unavoidable that the general terms made use of in the statute do not confer the power the proposition would involve, We can not as a matter of construction deduce from the general terms of a statute a legislative intent which there is no reason to suppose existed in fact, but which, on the other hand, the circumstances all tend to show was not suggested when the law was under consideration, and if it had been suggested would have been received with no favor." (P. 147.)

In the same case the commission invited the carriers to establish relations among themselves.

"The act has doubtless conferred upon the commission a greater power to protect localities against the carriers than it has to protect the carriers against themselves or against each other. It was probably thought in Congress that with the liberty of action left to the carriers they would not needlessly rush to destruction. The assumption may not prove to be well founded, but nothing seems plainer than that under the law as it stands the protection of carriers against destructive rivalry and rates that lead directly to bankruptcy must be found chiefly in prudent management, in the cultivation of reasonable relations among themselves, in mutual forbearance, and the application of a sense of justice to their mutual dealings and in their rivalries. If they deliberately proceed to destroy each other, the law must take care that in doing so they injure as little as possible individuals and communities dependent upon them for transportation facilities."

In I. C. C. *v.* C., N. O. & T. P. Ry. Co. (167 U. S., 479) the Supreme Court fully approved the observations of Judge (then Interstate Commerce Commissioner) Cooley and said:

"Now the rate may be unreasonable because it is too low as well as because it is too high. In the former case it is unreasonable and unjust to the stockholder, and in the latter to the shipper. It was declared by this court in Covington & Lexington Turnpike Road Co. *v.* Sandford (164 U. S., 578, 597) that in determining the question of reasonableness 'its duty is to take into consideration the interests both of the public and of the owner of the property;' but in the matter of the Chicago, St. Paul & Kansas City Railway, supra, the commission held that it had no power to order rates to be increased upon the ground that they were so low that persistence in them would be ruinous. The opinion in that case, prepared by Commissioner Cooley and with his usual ability, while seeking to prove that under the provisions of the statute the commission has no power to prescribe a minimum or to establish an absolute rate but only to fix a maximum rate, goes on further to show how the operation of other provisions of the act tend to secure just and reasonable rates. Were it not for its length, we should be glad to quote all that he says on the subject. We think that nearly all of the argument which he makes to show that the commission has now power to fix a minimum or establish an absolute rate goes also to show that it has no power to prescribe any tariff or fix any rate to control in the future."

But the important point that I am making here is that to say that these general advance rate cases which have been considered by the Interstate Commerce Commission from time to time, and which can only be brought on by the competitive carriers grouping themselves or agreeing among themselves concurrently to file or to initiate an advance in rates, is a clear violation of the

Sherman Act, and can not be regarded by the public or by public authority as a workable remedy, because they come into court free from criminal prosecution under our statutes only because of the necessity of the case. The Interstate Commerce Commission recognizes that that was the only technical way in which the commission could really gain jurisdiction over the matter; that is, by the carriers initiating and filing their proposed advance tariffs.

The plain illegality of this concurrent action was strikingly illustrated when an injunction was secured by the United States on the instruction of President Taft, in 1910, when the carriers proposed to file an advance in rates and were enjoined by the district court in Missouri, when the court issued the injunction, and it was only suspended or dismissed when the carriers saw the President and agreed to withdraw those rates, and not make any advances unless the commission would approve them. Then, the injunction was dismissed. But the law is the same and a general advance by competitive carriers—and it is obvious that no carrier can advance his rate without an advance by the other carriers involved in that rate—it is of necessity a violation of the Sherman Act, resulting from the concurrent or concerted making of the rate and the filing of the rate. The fact that the Interstate Commerce Commission has a reserve power of suspension, and that it may decline to suspend on the ground that a rate is reasonable, has nothing to do with the Sherman Act. It not only must be reasonable, but as the decree in the Trans-Missouri freight case asserted, the railroads were required to desist from taking any action which would tend to suppress free and unrestrained competition. The court held that the shippers were entitled not only to a reasonable rate but were entitled to the lowest rate that competitive rivalries would produce.

So the present act with section 15a does not relieve the carriers. It is only by virtue of section 15a, and by reason of action initiated by the commission itself, that enables the rates to be advanced without any violation of our statutory policy.

The authorities are clear on that point. A second fundamental reason why the commerce act is wholly inadequate to protect the carriers arises out of the complete incapacity under the old statute to adjust the rate structure to the reasonable needs of the several carriers arising out of their diversity in earning power under the application of a competitive rate structure. The fact is that several of the cases went off because several of the carriers signing the applications for advances were in an affluent condition. The statement was made by the commission that a great many carriers appearing in one proceeding were in need of additional revenue, but because of the absence from the statute at that time of the requirements of our rate-making system, enabling and requiring the commission to group the carriers in establishing the rate level and by recapture of excess earnings to adjust those rates to the reasonable necessities of different carriers, as has now been accomplished by section 15a, they were forced to reject those claims of those carriers who were entitled to relief. That is a conclusive reason why the provisions of section 15a were not accorded sufficient consideration by the Interstate Commerce Commission, because they did not have the power to do it.

A third fundamental reason why no one really having any consideration for the sound and wholesome success of the existing systems should not countenance the mutilation of section 15a is that under the burden of proof to which the carrier is subjected in filing application for a general rate advance, he will have to prove his case, as any other claimant in a lawsuit. Everybody knows that absolute proof is impracticable. The Interstate Commerce Commission interpreted the law as meaning that the proof must be conclusive. It said in so many words that it must be of the highest probative character, and to use the language of Mr. Commissioner Myers: "It must be conclusive." And, of course, it is bad enough to be forced to have recourse to a lawsuit to get the necessary revenue to survive, but it is doubly bad to be subjected to a degree of proof that shall be conclusive. Section 15a for the first time requires the commission to initiate the inquiry into carrier revenue and to use its best judgment in producing a fair return.

Another reason why these considerations of fair return, carrier credit, and results in the aggregate could not be given first-line consideration before the adoption of the transportation act was because a minority, perhaps, but always a formidable minority, on the Interstate Commerce Commission felt that any such proceeding was unwarranted; that their duty lay to consider individual rates; that whether rates were right was a question of whether they were right to the shipper; that the revenue to the carrier was not a matter for them, but

was a matter for Congress; and that under section 15, the section providing for a remedy, as distinguished from the section providing for jurisdiction, that they had no jurisdiction under that section but to consider each individual advance proposed without any consideration to the general effect of rates. Mr. Commissioner Clements, in one of the most important of those cases, protested against the partial relief granted by the majority and described it as a most serious and portentous action. And if the Interstate Commerce Commission was so divided, although the majority may have felt inclined to give some consideration to the revenue factor, you can well understand that a jury, voting on each question, when a number of the commission disagreed as to their power to give any relief, must also oppose in detail, saying they had no power at all; that the result was necessarily not all that it might have been if the policy had been declared as Judge Prouty and others declared it should be; that if the question of revenue was to be given equal importance with other considerations it must be through congressional action.

As illustrating in some detail the practical difficulties in securing relief on the ground of revenue consideration, I present and read now an analysis of the authorities.

GENERAL RATE ADVANCES PRIOR TO TRANSPORTATION ACT AND SHERMAN ACT.

The United States Supreme Court held in United States *v.* Trans-Missouri Freight Association (166 U. S., 290), decided March 22, 1897, and in United States *v.* Joint Traffic Association (171 U. S., 505), decided October 24, 1898, that concerted action between carriers in fixing competitive rates was in violation of the Sherman Act.

Where rates are competitive a carrier can not initiate an increase in rates without concurrent and necessarily concerted action on part of the competitor. Otherwise, the advance in rates would attract no business and fail of its purpose.

It is a well-known fact that in at least one of the Advance Rate cases one of the carriers joined in the proceeding involved not because of any necessity on its part but out of a proper regard for its more necessitous competitors.

Compare the assertion of one of the carriers at the hearing in the C., St. P. & K. C. case (2 I. C. C., 137):

"Our reasons for making rates as above are as follows: At a meeting of the Northwestern Association, of which our line is not a member but at which we were notified to be present, all the other lines urged us to assent to the rates (the 60-cent scale) which all said lines had adopted. We assented to said rates against our own interests for the sole purpose of assisting our competitors to regulate their local rates in accordance with their necessities, which they alleged to be very pressing."

The character of the concerted action necessary in a general advance in rates before the transportation act is shown in the Fifteen Per Cent case, decided June 27, 1917 (45 I. C. C., 303, 309, 310).

The mere fact that rates initiated by concerted action on part of competitive carriers are subject to suspension or review by the Interstate Commerce Commission does not obviate the fact that the action of initiation was exclusively the function of the carrier. The power of suspension and approval or disapproval does not go back of the origin of the rate—its filing by the carrier. And if a group of competitive carriers violate the Sherman Act in filing agreed tariffs, their liability under the Sherman Act is not suspended by the commission's subsequent approval of the result as reasonable. This fact was emphasized by the Supreme Court in W. U. T. Co. *v.* Esteve Bros. & Co., decided June 1, 1921 (65 L. ed. Adv. Op., 653, 655), where the court said:

"The railroad rate is established, and can only be established, by filing the tariff with the commission. Telegraph companies may initiate rates without filing tariffs with the commission. (Clay County Produce Co. *v.* Western U. Teleg. Co., supra.) Plaintiffs insist that it is the filing and subsequent publication of the railroad rate which gives it the force of law and requires the shipper to take notice of it. But the contention, by dwelling unduly upon the procedural features of the act, would defeat the end which Congress had in view. Both railroad and telegraph-cable rates are initiated by the carrier. It is true that a railroad rate does not have the force of law unless it is filed with the commission. But it is not true that out of the filing of the rate grows the rule of law by which the terms of this lawful rate conclude the passenger."

The following expression from the Trans-Missouri Freight case (166 U. S., p. 339) makes plain the violation involved in concerted action to increase competitive rates:

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates can not be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up competition is allowed no play; it is shut out; and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

HISTORY OF CERTAIN GENERAL ADVANCE CASES BEFORE INTERSTATE COMMERCE COMMISSION PRIOR TO TRANSPORTATION ACT, 1920.

The following quotation from the Twenty-eighth Annual Report of the Interstate Commerce Commission, 1914, sets out in the language of the commission the history of proposed general advances in rates prior to the date of the decision (Dec. 16, 1914):

"PROPOSED RATE INCREASES IN OFFICIAL CLASSIFICATION TERRITORY.

"By the Mann-Elkins amendment of 1910 the commission was authorized to suspend tariffs and investigate their propriety before they became effective.

"Theretofore, and ever since passage of the act to regulate commerce in 1887, carriers had been free to establish charges under pain of making reparation if subsequently found by the commission to be unjust or unreasonable.

"Despite that freedom they had failed to effect any general advance in any given territory.

"The agreement in 1889 of certain trans-Missouri carriers for 'establishing and maintaining reasonable rates' was followed in 1890 by the antitrust act, which was held by the Supreme Court to apply to common carriers by railroad, in United States *v.* Trans-Missouri Freight Association (166 U. S., 290), decided March 22, 1897.

"Again, 31 carriers entered into a somewhat similar agreement, which, in turn, was held by the Supreme Court to be violative of the antitrust act, in United States *v.* Joint Traffic Association (171 U. S., 505), decided October 24, 1898.

"As mentioned in previous reports of this commission, tariffs were filed by eastern and western rail carriers in 1910, while the Mann-Elkins bill was pending, proposing certain increased rates. Under direction of President Taft the Attorney General sought and obtained in Missouri an injunction restraining the operation of the increased western rates. This led to a conference with the President by representatives of the carriers so enjoined, who agreed to withdraw the proposed increases effective June 1, 1910, and to make no general increase in rates except with the approval of the commission. The President's message of June 7, 1910, referred to these facts and recommended that the suspending power under the bill be made effective upon its passage. This was done, and thereafter the increased rates, both eastern and western, were submitted to the commission and postponed, and the injunction suit was dismissed.

"The increased rates were not approved by the commission for the reasons stated in its reports. (20 I. C. C., 243; 20 I. C. C., 307.)

In May, 1913, most of the rail carriers in official classification territory filed with the commission a petition praying for a reopening of the former proceeding decided in Advance in Rates-Eastern case. (20 I. C. C., 243.)

"Such reopening was deemed inexpedient, but the commission, on June 21, 1913, ordered an investigation on its own motion into the following matters:

"1. Do the present rates of transportation yield to common carriers by railroad operating in official classification territory, adequate revenues?

"2. If not, what general course may carriers pursue to meet the situation?

"This investigation is docketed in No. 5860.

"On October 15, 1913, most of the rail carriers which had joined in the petition filed tariffs embodying the so called '5 per cent advance,' the increases

ranging, however, from less than 3 per cent on some traffic to 50 per cent on other, and omitting some items altogether, as, for example, rates between certain points on sugar, iron and zinc ore, and live stock.

"No increase was proposed as to anthracite coal moving to Atlantic tidewater or on most of the interstate traffic in New England.

"Increased rates on the same basis on intrastate traffic were proposed, but voluntarily suspended by the carriers.

"The interstate increased rates were suspended and their propriety investigated by order of November 4, 1913, in Investigation and Suspension Docket No. 333, which was thereafter conducted in connection with No. 5860.

"Like tariffs were from time to time filed and suspended by separate orders, the last having been entered May 7, 1914.

"Meantime hearings commenced on November 24, 1913, and were continued until May 1, 1914, with a further hearing on May 29, 1914, as to the relations between the Baltimore & Ohio and the Cincinnati, Hamilton & Dayton.

"Argument was had during the week ending May 2, 1914, and on July 29, 1914, the commission handed down its report (31 I. C. C., 351).

"The substance of this report in the two proceedings is stated in the syllabus, as follows:

"'Upon the record found that the net operating income of the carriers in official classification territory, considered as a whole, is smaller than is demanded in the public interest; but that no showing has been made warranting a general increase in trunk-line rates, in rail-and-lake rates, or in the rates on traffic moving between the different rate territories in official classification territory.

"'An increase by 5 per cent in the intraterritorial class and commodity rates in Central Freight Association territory approved, subject to the qualifications described in the report. The need of a general readjustment of rates in that territory discussed.

"'Suggestions made for consideration by all the carriers in official classification territory as to the methods by which they may increase their net income other than by a general rate increase. Special attention is called to the existence of many individual rates and charges apparently unremunerative.

"'Shortly thereafter war was declared in Europe, and on September 15, 1914, the carriers filed a petition for rehearing, which was granted by order of September 19, 1914, limiting that rehearing to presentation of facts disclosed and occurrences originating subsequently to the date upon which the records previously made in these cases were closed.

"'This rehearing was had before the commission on October 19, 20, 21, 22, and 23, 1914, followed by argument October 29 and 30, 1914, and the matters so presented were taken under advisement.'"

CONCERT OF ACTION BETWEEN COMPETING CARRIERS IN FILING RATE ADVANCES.

[Extract from Annual Report of Attorney General of the United States for year ended June 30, 1910, pp. 8 and 9.]

"In the latter part of May, 1910, during the last days of the discussion in Congress over the bill for the creation of a commerce court and to amend the interstate commerce act (approved June 25, 1910), complaint was made to the Department of Justice by representatives of large shippers in what is known as 'western classification territory'—Illinois, Wisconsin, Minnesota, Iowa, Nebraska, and Missouri—and by a number of Senators and Representatives from these States that the presidents of some 12 or more railroad companies had met in Chicago and agreed on a comprehensive advance in a very large number of commodity rates throughout that territory that this increase had been so planned as to take effect before the new law was enacted, thus enabling the railroad companies to collect the increased revenue during the period of any investigation into their reasonableness by the Interstate Commerce Commission. After such investigation as the very limited time before the proposed increases were to take effect made possible, the conclusion was reached by the department that this was a case of deliberate attempt by the railroad companies involved to fix rates by agreement which would restrain freedom of action by any one, or less than all the companies involved, made for the express purpose of evading the provisions of the law about to be enacted and of thereby imposing an increased rate of—to say the least—doubtful reasonableness upon the shippers in a great area of the country. Papers were at once prepared, applica-

tion made, and an ex parte injunction obtained from Judge Dyer, of the United States Circuit Court in Missouri, preventing the proposed increase in rates from becoming effective.

"The representatives of the principal railroad systems thereupon sought an audience with the President and agreed that they would make no general increase in rates unless with the approval of the Interstate Commerce Commission. The President communicated these facts to Congress by message dated June 7, 1910, and recommended that those provisions in the pending bill which authorized the commission to investigate proposed increases of rates on its own motion, and to postpone the effective date of such increases, be made to take effect immediately upon the passage of the act. This was done, and at as early a date as was feasible the commission entered upon an inquiry, which is now approaching conclusion, into the necessity of a general increase in rates. The bill having accomplished its purpose and Congress having by the law of June 25, 1910, made adequate provision for dealing with the subject, the suit was discontinued."

PRACTICAL LIMITATIONS ON POWER OF INTERSTATE COMMERCE COMMISSION TO GIVE FULL CONSIDERATION TO REVENUE REQUIREMENTS OF CARRIERS.

In the Eastern Advance Rate case (20 I. C. C., 243, 261) is the following expression by the commission, speaking through Judge Prouty, of the limitations of which the commission was conscious in determining applications for general advances in rates based on revenue considerations and upon the return upon railway property:

"Further reflection confirms what this commission, having under advisement a similar question, said In re Proposed Advances in Freight Rates (9 I. C. C. Rep., 382, 404):

"'It is plain that until there be fixed, either by legislative enactment or judicial interpretation, some definite basis for the valuation of railroad property and some limit up to which that property shall be allowed to earn upon that valuation, there can be no exact determination of these questions. In the absence of such a standard the tribunal, whether court or commission, which is called upon to consider this matter, can only rely upon the exercise of its best judgment.'

"We must take the history of these properties and, from a consideration of all the facts before us, arrive at some rough notion of their value for railroad purposes. As a part of that same inquiry we must form some idea of the rate of return to which the property of these carriers is entitled.

"Here again it should be observed that this commission has no jurisdiction to deal with that question as such. We have no authority to say that a railroad ought to earn, either as a matter of right or as a matter of public policy, any given per cent upon its value; but in discharging our duty, to say whether these particular rates which the carriers propose to establish are just and reasonable, we must determine in a general way what a fair return would be, and that matter will be next considered."

The Five Per cent case, decided July 29, 1914 (31 I. C. C., 351), in which general relief was denied before the data for the year ending June 30, 1914, was available, was reopened on petition of the carriers, filed September 15, to authorize evidence of a change in conditions since the previous hearing, and on rehearing was decided December 16, 1914.

The commission was urged to acquiesce in the carriers' proposal of a general increase which had been denied at the previous hearing, and the item of credit and revenue considerations were urged as sufficient bases for this relief.

Referring to this, among other suggestions, the commission asserted (32 I. C. C., 329):

"With some of these considerations we have, as a commission, nothing to do. Our powers and functions are those, and only those, conferred by Congress. As was said in Advances in Rates, Western case (20 I. C. C., 307, at p. 317):

"'We must not regard too seriously, however, the effort of railroad counsel to establish this commission in loco parentis toward the railroads. We must be conscious in our consideration of these rate questions of their effect upon the policy of the railroads and, ultimately, upon the welfare of the State. This country can not afford to have poor railroads, insufficiently equipped, unsubstantially built, carelessly operated. We need the best of service. Our railroad management should be the most progressive. It should have wide latitude for experiment. It should have such encouragement as would attract the imagina-

tion of both the engineer and the investor. Nevertheless, it is likewise to be remembered that the Government has not undertaken to become the directing mind in railroad management. We are not the managers of the railroads. And no matter what the revenue they may receive there can be no control placed by us upon its expenditure, no improvements directed, no economies enforced.' "

On hearing, however, the commission did agree to advance rates on certain commodities, recognizing that the European war had brought about a situation that was entitled to some recognition. Accordingly, the commission permitted horizontal rate increases in official classification territory, with certain exceptions, but there was vigorous dissent. Commissioner Clements asserted that under the interstate commerce act there was but one question lawfully before the commission for determination; that is, whether the rates proposed and under suspension were "just and reasonable"; that the burden of proof in respect thereto was placed by statute upon the carriers and that the latter had wholly failed to meet this burden. Speaking of the report and decision of the commission, Commissioner Clements asserted:

"In my view the foregoing report and decision constitute a new and radical departure and a most serious and portentous step, in that by this step the commission is shown to deem itself justified in sanctioning these increased rates in the latter territory upon consideration of general financial and operating results, without resorting to the ordinary tests or factors heretofore deemed pertinent and necessary to the determination of the reasonableness of rates. I am not aware of any prior case in which the commission or any court has held that the need by a carrier of money was of itself proof of the reasonableness of a specific rate, or body of rates, increased to meet such need. * * *

"As I understand it, justification of the rates permitted by this decision to be increased rests largely upon the need of greater net revenue to enable the carriers to afford adequate service to the public, to meet their financial obligations, and maintain dividends in such manner as to encourage further investments in railways and their securities. If these considerations constitute a sufficient basis for wholesale approval of a body of increased rates agreed upon by all carriers in a given territory, competing or connecting, weak or strong, the same must be equally true if every road in the country, as well as every rate, were included in a proceeding before us. (32 I. C. C., 337.)

"It is by no means certain that it would not, in the long run, be cheaper to the public to guarantee the bonds of the weak roads unable to meet their obligations rather than to try to take care of them by increased rates, which inure to the strong roads as well as the weak. (32 I. C. C., 340.)

Among the extraordinary accommodations which were necessary to a general advance case prior to the transportation act is to be found the entirely informal and extra legal agreement made at the time of the hearing of the Fifteen Per Cent case of 1917, in which is to be found this statement (45 I. C. C., 311):

"'During the preliminary conference above referred to authorized representatives of carriers in each of the three rate territorial districts expressed the willingness of all the carriers in the United States to waive all technical requirements and guaranties in order that an expeditious and practicable procedure might be adopted. With this in view they agree upon the record that if the commission should authorize an increase on such a proceeding as we have conducted in the instant case they would, if at a later date the situation should change and the commission should be of the opinion that the increased rates were, in whole or in part, no longer just and reasonable, reduce them on an expression from us to that effect, following a proceeding no more extensive than or different from that in which the increase was permitted.' "

The proof required of the carriers in urging the necessity for additional revenue had to meet the test of exceptional requirements. Commissioner Meyer asserted that they must prove "conclusively." (Fifteen Per Cent case of 1917, 45 I. C. C., 303, 331.)

"In spite of increased and increasing expenses, there is nothing before us to prove conclusively that the net returns of carriers in the eastern district for the calendar year 1917 may not be more favorable than the net returns for all but a very small number of years during their entire history. * * * Before important action like this is taken the most conclusive proof of its necessity should be before the commission."

Commissioner Daniels had protested against the exceptional burden of proof in the Western Advance Rate case of 1915. (35 I. C. C., 680.) He asserted that the commission was for the first time adopting novel doctrine "to disallow

rates save where the specific evidence relating thereto makes a refusal manifestly impossible."

We assert, without fear of successful contradiction or controversy, that section 15a does work out an effective dual process in the regulation of rates, as compared with the individual rate basis which prevailed before the time of its passage; that it brings into consideration an effective revenue factor based on results, with all its necessary implications in determining the power of the commission with reference to intrastate rates, is a proposition which must necessarily follow. I say, with all of its necessary implications; no more, no less. Can Congress be rationally urged to abandon the sound provisions of 15a because general rate adjustments under that section, necessary to sustain the agencies of transportation, throw inadequate State rate.

Now, I hope that I will not be misunderstood as insisting that section 15 (a) has any direct bearing in extending the jurisdiction of the Interstate Commerce Commission over intrastate rates. But there is no doubt in my mind that if the revenue consideration is read into the Congress' definition of a reasonable rate—because section 15 (a) provides that in the exercise of their jurisdiction to establish reasonable rates, the consideration of revenue must be taken into consideration, and it has a most important bearing in connection with sections 13(3) and 13(4).

In other words, Congress has said that a reasonable rate, assuming efficiency and economy in railway management, is a rate which will accomplish the purposes intended, namely, the purposes enumerated in section 15a; that is, in these groups of competitive carriers, rates can not be considered reasonable or just unless they contribute their fair proportion to the cost of operation and a fair and reasonable return on the value of the transportation machine. That recognizes for the first time a national and general interest in the survival and sound future of the agencies of interstate transportation; and that is what Congress meant to adopt. That is to say, that communities are not to be regarded altogether alone, nor is an individual, but that the general public interest in transportation is the criterion, and that means that the welfare of the transportation system in a traffic basin or in a group established by the Interstate Commerce Commission is the public's welfare, to which Congress must respond in the exertion of its jurisdiction under the commerce clause; and that in working out that result, and in order to extend the agencies of transportation within that traffic basin, there must be rates which will, as a whole, enable it to survive, and finally that these results are all embraced, to use the language of section 15a, in the exercise of the Interstate Commerce Commission's jurisdiction to establish reasonable rates.

Now, there is a conclusive definition of what is a sound policy even without so affirmative a statutory declaration, but without the statute the relation of individual rates to a wholesome result in the aggregate might have remained secondary and obscure, as we have shown, or might be a matter of controversy because of the loose method of quoting the time-worn proposition that while rates must be reasonable from the standpoint of the carrier, they must also be reasonable to the shipper, as if that meant the individual shipper. That is a singular fallacy. The value of the service to any particular shipper, if he happened to be going to the bedside of an ill member of his family or was on a train to be taken to a hospital to be operated on, would be incalculable to him. But that does not determine it. It is not the value of that service to him. It is the value of that service to him as a member of and as deriving his right from the welfare of the community of which he is a part, which may be the public within any traffic basin or within the United States, if the Congress, within its discretion, extends the policy to the United States as a whole.

And so, without a particular consideration of what is meant by the fact that a rate must be reasonable to a shipper, it is evident it is much misunderstood.

I think Judge Cowan here expressed gratification that the Interstate Commerce Commission had held in the Grain Rate case returned to first principles in holding that the rate must be reasonable to the shipper, as if that meant that whatever rate he could afford to pay would be reasonable to him and what he could not afford to pay would not be reasonable. And I would say that the Supreme Court of Maine has expressed the sound doctrine in a clear, sound way. It is not altogether what the cost for performing the service would be, but what the public, in any given traffic basin, or the community as a whole, or the United States as a whole, could reproduce that agency under conditions of private ownership and operation—of course, in case of the railroads, under com-

petitive conditions, allowing a fair and reasonable return. The public, which insists on duplication and competition, must pay for it, and it must pay for the necessarily incidental by-products of competition. But it is not asked to pay for improvidence or waste or inefficiency. The test is the reasonable cost of producing the service under the conditions, plus a reasonable profit. That is what is meant by a rate "reasonable to the shipper."

In the decision of the Maine Supreme Court, to which I have referred, the Brunswick case (99 Me., 371), the court was dealing with a waterworks utility in which the public interest was in that case confined to a single community. The opinion showed plainly that what they meant by the expression "reasonable to the consumer" was, of course, that the cost of the service, under reasonable methods of replacement, including a fair return, was intended, and not what a thousand different minds could agree on, as the value of that service to the individual consumer. That contention, with the necessary implications to which I have referred, can, of course, be reduced to an absurdity when we see that the same rate must be charged to all passengers, the one whose time is the most valuable and to the one who is wasting his time and substance in traveling around from one place to another.

If we analyze all of this bitter attack on transportation rates and on the transportation act, we will find that is not based on sound criticism. It is not based on the necessities of our railroads or their survival. It is based on the entirely irrelevant proposition that the rates are difficult to pay—not that the service costs less than is charged, and not that the railroads can be preserved for the service of all of the people for less. And so it is that the committee should not be diverted from the only sound basis, which is the best interest of the public; it is not the public in any particular locality of the public in any class, but the public's interest as a whole. And we think that a realization of that distinction, which ought to be fundamental, would relieve our friends of a great deal of animosity which has been injected into this crisis by the fancy that the State rates have been unduly interfered with by the Interstate Commerce Commission.

The CHAIRMAN. May I suggest what has been strongly urged upon us here by more than one witness? I may state it in this way, that the rates must be low enough to move the traffic; that the shipper, in order to move the traffic, unless he can make a profit in selling his commodity, whatever it may be, will not move the commodity; and the conclusion from that is that the rate must be such as to enable the shipper to make a profit, no matter what becomes of the railroad. That is the general proposition that is urged upon us here.

Mr. JOHNSTON. Certainly, sir; and that is unfortunate. That has about the same relation to the Federal Constitution as the philosophy of Laplace had to the Diety in explaining his nebular hypothesis to Napoleon, when Napoleon asked him in his theory what did he do with God; and Laplace's answer was, "Sir, I have managed to deal without that hypothesis." That is exactly what that contention does so far as sound rate making or the Federal Constitution is concerned. And not only does it run counter to the Constitution, but it is destructive of the transportation agencies. And those agencies, if they are destroyed, those agencies, the railroads, if their existing organizations break down under the pressure now being exerted on Congress and forced back into Government operation and Government ownership, the slight and occasional interference with State regulation, which is now assailed with undiscriminating and artificial vehemence, will become absolute and perpetual. I think that is the answer. And that will result from the efforts of those who are very much concerned about the preesnt managements and to keep them functioning under private ownership.

Senator STANLEY. If rates are so high as to render the shipment of commodities to markets unprofitable, it will produce the same effect so far as the railroads are concerned.

Mr. JOHNSTON. Certainly, Senator. I do not want to be misunderstood. Our Constitution does not guarantee anyone against competition or against periods of extreme deflation. The rate is a proper rate and it is a productive rate, which will enable traffic to move, but that is a different consideration; that is, from the revenue standpoint, the rate that is the maximum which the carrier, as distinguished from the shipper, can demand is the rate that will produce the highest revenue. The commission would certainly not be taken to task or criticized—I have heard none on the part of the management, and I have heard none on the part of the security holders' association, suggesting that the commission did not have entire flexibility in that situation. In fact, it is shown to be so. No one has suggested that they have enough revenue, but, in fact, they are lower-

ing the rates because of the very principle you mention, but that is a consideration to which the carrier must yield in his own interest and because of the economics of diminishing returns. It is not a result which the shipped can demand in his own right.

Now, as to the Interstate Commerce Commission and the various State commissions—and your inquiry suggests the rather singular fact that those who have continued in the most violent opposition to everything that the transportation act stands for in rehabilitation and rate adjustment have asserted that one of the most epochal decisions in recent years was in the Grain Rate case, which was rendered in entire consistency with the transportation act, and not in violation of a word of it. They have said it was monumental in its importance and beneficence, and they have entirely overlooked the fact that it is a decision arrived at in complete harmony with the principle of the transportation act, and that decision embodied the thought which you have in mind, I think.

Senator STANLEY. My idea is that a rate greater than the traffic would bear, outside of the legal right to make it, is industrially unwise.

Mr. JOHNSTON. That it would run against the law of diminishing returns. And the railroads recognize that, and the commission recognized it, and gave full thought to it. And they have kept their minds and their hearings open to all suggestions of considerations of that character. There are other cases involving fundamental commodities before the Interstate Commerce Commission, and involving readjustment of those rates, and I have no doubt, if the evidence sustains it, the commission will make any appropriate adjustments that will be necessary.

Returning, for a moment, to the suggestion that the rate must allow an element of profit to the shipper, my friend, Mr. Thorne overlooks the fact in the chart that he presented here, and when he was arguing so stoutly for the principle that in times of prosperity there should be laid up a surplus for the lean times, that the curve which he exhibited for agricultural products in the last two or three years was inches above the curve of railroad rates; that the operation of surplus ought to apply to industries as well as to railroads, and that the railroads were so situated that that could not realize unregulated returns as the other industries did, and that if the farmers did not retain the profit which was inherent in the wide spread in their favor between the price of farm products and artificially depressed railroad rates, that was a fault in the economic situation, and not the fault of the railroads.

Now, as to the question of grouping and its effect on the general public welfare, I desire to present and read to the committee some excerpts from cases and some comments thereon, as follows:

Reasonable rate to the shipper means a reasonable rate for the public generally, not for individual shippers, and this means the reasonable cost of which the service can be produced, with an added allowance for the risk of loss assumed by the owner of the utility.

The correct definition of reasonable rates applied to a local utility supplying water to a community is found in Brunswick & T. Water District *v.* Maine Water Co. (99 Me., 371; 59 Atl., 537).

"They are enabled to charge reasonable rates. Reasonable is a relative term, and what is reasonable depends upon many varying circumstances. * * * Then, their reasonableness relates to both the company and the customer. Rates must be reasonable to both, and if they can not be to both, they must be to the customer. * * * A public service company can not lawfully charge in any event more than the services are reasonably worth to the public as individuals, even if charges so limited would fail to produce a fair return to the company upon the value of its property or investment. Such, we think, is the law.

"We do not doubt that when the worth of a public service of this kind to the public or the customers is spoken of necessarily one of the elements to be considered is the expense at which the public or customers, as a community, might serve themselves were they free to so do. * * * When the worth of water to a consumer is to be estimated, we are not limited to the value of water in itself, for it is an absolute necessity. Its value has no limit. * * * In estimating what it is reasonable to charge for a water service—that is, not exceeding its worth to the consumers, water is to be regarded as a product, and the cost at which it can be produced or distributed is an important element in its worth. It is not the only element, however. The individuals of a community may with reason prefer to pay rates which yield a return to the money

of other people, higher than the event shows they could serve themselves for, rather than make the venture themselves and risk their own money to loss in an uncertain enterprise. It was said by us in the Waterville case that the investor is entitled to something for the risk he takes, and it is not unreasonable for the consumer to be charged with something on that account. That is one of the things which make up the worth of the water to the customer. The same element enters always into the relation between producer and consumer. * * *

"In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual, or some few individuals to supply themselves, for one may be blessed with a spring and another may have a good well. It means the worth to the individuals in a community taken as a whole. It is the worth to the customers as individuals, but as individuals making up a community of water takers."

The case cited is, we think, mistakenly criticized by Judge Prouty, in Eastern Advance Rate case (20 I. C. C., 243, 273, 274) as being too restrictive upon the utility, since he considered that this doctrine if applied to competing railroads would force the road having higher costs between competitive points to come down to the lowest cost of its competition. This does not follow. The "community" or "public" whose interests form the criterion in such cases are the general public—and not the interest of an individual shipper or of any given community. In the case of interstate commerce the public interest involved is as broad as the commerce clause and under the transportation act the public interest involved in any given inquiry is the public served by any group into which the carriers may be divided for rate-making purposes by the Constitution.

In the Eastern Advance Rate case (20 I. C. C., 273, 274) the commission reached the conclusion that no shipper or locality is entitled to insist that rates be established for each particular line of railroad without reference to the interest of the general public in the survival of competitive systems, and reached the conclusion that this principle not only applied in determining the reasonableness of a specific rate between two points service by two or more carriers, but to a general level of rates. The commission, accordingly, held that average conditions must be taken into consideration and studied the situation under review from a group standpoint, following like action in the Spokane case (15 I. C. C., 376, 392) and in the Kindel case (15 I. C. C., 555, and in 9 I. C. C., 382).

The court said (20 I. C. C., at p. 272, 273):

"It is plain that if these two roads (Delaware, Lackawanna & Western and Lake Shore & Michigan) were to be considered alone no justification could be found from a revenue standpoint for these advances, and that is the question before us. On the other hand, there are lines operating in this territory where the showing in favor of the advance, having reference to their financial necessities, would be a strong one. What lines, shall be examined for the purpose of reaching a conclusion in this matter?

"This general question was presented to the commission in the Spokane case (15 I. C. C. Rep., 376), where it was said, at page 392:

"'Now, the complainants say that it is the business of the commission to take the least expensive of these routes and to determine these rates upon the basis of the investment in that route. We should allow the Great Northern Co., if that be the least expensive, what will be a fair return upon its property considering the financial history of that company, and no more, even though the rates thus established when applied to the business of its competitors would deprive them of a fair return upon their investment.

"'The defendants insist that exactly the opposite course should be followed. They urge that a railroad is entitled to a fair return upon its investment, and that this rule applies to all railroads alike. This is the right of the railroad laboring under disadvantages of location and operation, as well as of that one more favorably circumstanced. Hence, the commission must consider that railroad whose net earnings will be least, for if it establishes rates which only yield fair returns to the road most favorably situated, it of necessity knowingly and intentionally deprives every other road of a fair return upon the value of its property.

* * * * * * *

"'The city of Spokane, argue the complainants, is entitled to the cheapest means of transportation between St. Paul and Spokane. The Government may construct a railway or it may delegate that duty to an agent. If it elects to employ an agent, it may require it, and, indeed, must require it, to establish

reasonable rates with respect to its own line, even though this should bankrupt other lines already in existence. * * *

"'The city of Spokane could not develop if served by the Great Northern Railway alone; nor can we look wholly to the interest of Spokane. The whole territory served by these defendant lines must be considered and the existence of all these railroads to that territory is absolutely essential. There railroads can not exist unless rates are established which will yield a fair return upon their property. We must, therefore, in fixing these rates, have regard not altogether to any one particular railroad, but to the whole situation, and must consider the effect of whatever order we make upon all these defendants.'

"This rule was adhered to in the Kindel case (15 I. C. C., Rep.) in the following language:

"'In the Spokane case (15 I. C. C., Rep., 376) we held that the reasonableness of a rate between two points served by two or more carriers could not be determined by consideration alone of that line which is shortest and most favorably situated as to operations, earnings, etc., but that the entire situation must be considered.

* * * * * * *

"'As already suggested, we can not in determining a competitive rate select that railroad which is the shortest or the most advantageously situated and limit the rate to what would allow that property fair earnings. We must consider this entire situation and determine a reasonable rate not merely with reference to the Union Pacific but with reference to all lines serving these Colorado common points via reasonably direct lines.'"

In the Western Advance Rate case of 1915 (35 I. C. C., 561) is to be found this observation:

"* * * If only the more necessitous of the carriers in this proceeding were proposing these increases their plea would come with greater force than it does when coupled with their more fortunate rivals."

So also in the Fifteen Per Cent case of 1917 (45 I. C. C., 303, 315) the commission, in denying relief, asserted:

"An examination of the operating results of individual carriers shows that certain of them have lacked prosperity while others have been affluent. * * * We must consider not only the successful and strong but also the unsuccessful and weak. The needs of certa n weak lines, however, can not justify a course of action that is unwarranted by the condition of the larger number of strong and successful lines."

Commissioner Meyer in his opinion, dissenting in part, laid particular emphasis (p. 334) upon the prosperous condition of the Lackawanna.

In his dissenting opinion, Commissioner McChord asserted:

"Upon the facts before us, I concur in the dissent by Commissioner Meyer. The issue presented is in reality one largely of governmental policy, rather than a question whether the rates sought to be made effective July 1 are reasonable for the service of transportation. * * *

"Should this commission, upon the showing here made, approve an increase of rates * * * to strengthen the credit of the carriers, or should the prices of fuel and supplies be supervised by governmental authority?"

I present these quotations as the basis for my emphatic assertion that not until section 15(a) was adopted, was effective, and continuous attention given to the revenue necessities of the carriers, and that the responsibility for that result was repeatedly laid at the door of Congress. In adopting the valuation act Congress went half of the way. Its complement is section 15(a). If you repeal 15(a), you should repeal the valuation act and stop the expense to the Government and the railroads. Without 15(a) the valuation act—valuations—would be academic.

Now, in considering the effect of section 15(a) on the controversy of the States, I think it is necessary to consider what other important amendments accompanied section 15(a), from the standpoint of the railroads.

As I have said, before the adoption of the transportation act, their only status before the Interstate Commerce Commission was as that of a defendant. The only order that I have ever heard of the Interstate Commerce Commission making was an order restraining or giving some mandates to a railroad which was there in the status of a defendant. Certainly no revenue consideration could be affirmatively instituted by any carrier under the act prior to the transportation act based upon a revenue consideration.

And, of course, the Supreme Court of the United States had held that a carrier had no standing before the Interstate Commerce Commission to complain of discrimination as between localities or individuals. That was upon the well-known general principle of law that a party plaintiff can invoke remedies only to redress his own wrong and not a wrong to some one else. The Supreme Court has stated that in two cases, construing the interstate commerce act, which I will call to your attention.

In I. C. C. *v.* C. R. I. & P. Ry. Co. (218 U. S., 88) the court said (p. 109):

"That the companies may complain of the reduction made by the commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers in another. We have said several times that we will not listen to a party who complains of a grievance which is not his. (Clark *v.* Kansas, 176 U. S., 114, 118; Smiley *v.* Kansas, U. S., 447.)"

To the same effect it was held in A. T. & S. F. Ry. Co. *v.* U. S. (232 U. S. 199, p. 220):

"The claim that the order modified the established rate of $1.15 and reduces it to $1.122 in precooled shipments, thereby discriminating against the small fruit grower and those who forward under ventilation or under the carriers' method of refrigeration, is not an issue presented by any assignment of error in this record, even if the carriers were in position to make such a contention. (I. C. C. *v.* C. R. I. & P. Ry., 218 U. S., 88, 109.) There is no claim in this case that such rate thus distributed is unreasonable."

You will see that the last case I quoted from cites the case which I first read from. In other words, the Supreme Court has taken the position, which I have just stated, that the carrier could be heard only in the protection of his own interests. And that was a negative right before the transportation act was adopted, because they were there only as a defendant, and they could merely advance their protest against revenue reduction in a negative or in a defensive way.

Congress has made an important change in that situation, which has an important although indirect and consequential bearing on the relationship between interstate and intrastate rates, in that it has authorized the carriers to inaugurate in their own right an inquiry into the relationship, has condemned in terms undue or unreasonable discrimination, and has, by section 15a, plainly asserted that a rate structure is unreasonable which does not bear its proper part of the cost and profit of the service of transportation. The State commissions that are represented here have seemed to conceive that the only possible discrimination which could have been within the purview of the Shreveport case was in respect to interstate localities. When the State of Texas attacked the gross receipts of the railroad, the railroad there, to protest itself, did not have to prove that some individual or locality was hurt. It was the agency of interstate commerce that was hurt, and the railroads were able to obtain relief in the ordinary processes of the courts. And the presumption is—it is not a controlling one and it is not necessarily exclusive—that when you gave a remedy to the roads and authorized them to inaugurate a proceeding based on complaint of undue discriminat on arising out of a disparity in relationship between the State and interstate rates, and set out in the statute the categories asserted by the court as to discrimination in the Shreveport and Illinois cases, the presumption certainly is that you gave them a right to appear in their own interests. Not exclusively, perhaps, because it is not limited, but the inference is when you give a man a right to complain that you give him a right to stand on his own legs in that proceeding.

And so we say that when the critics of this measure assert that the Interstate Commerce Commission has never given effect to a revenue consideration in a hearing involving State rates, that is merely another way of asserting that before the adoption of sections 13(3) and 13(4) that nobody was authorized to appear and make such a protest except an individual or a locality. The discrimination may have existed. It may have been unjust and unreasonable. The general language of the Shreveport doctrine may have fully covered it; but unless it came within the narrow purview of sections 2 or 3, it may very well be that there was no one to complain. The principle of the Shreveport doctrine is not expanded when you merely extend its sound and beneficent operation to all who are, in their own right, injured by its breach. The contention of the State commissions here is that there is a vested right in a wrong. And when you extend the remedial process it is not a question of jurisdiction; but when you authorize the thing to be looked at from another angle it is another right, and other considerations come in which must have some consideration in the determination of that question.

No question of the reasonableness of rates is involved in considering the matter of discrimination between persons or localities; and in that connection I desire to read the following excerpts:

In I. C. *v.* B. & O. R. R. Co. (145 U. S., 263, 276) the Supreme Court asserted that the interstate commerce act was not designed "to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburgh; but if A agrees not only to go but to return by the same route it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1 and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in Great Western Railway Co. *v.* Sutton (L. R. 4 H. L., 226, 239): 'When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other persons or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.'

* * * * * * *

"It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a 'like and contemporaneous circumstances' as is rendered to a person who travels upon an ordinary single-trip ticket. If it be so, then, under State laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them."

Now, the whole trouble with the State commissions as to these orders, is that they vigorously asserted that discrimination had to be shown in and of itself as between individuals or communities or general classes of commodities, and literally forced, by their position, the Interstate Commerce Commission into taking only that view of it, and into making an order which was responsive to that sort of complaint. My opinion is that every order of the Interstate Commerce Commission made in these cases is strictly justified from the standpoint of the Illinois case. Although they are State wide, the Supreme Court stated, in the Illinois case, that if it had been the intention of the commission to make this order applicable to all passenger rates within the State of Illinois, that it would have stated so in unmistakable terms.

Now, it did say so in this case, and their order in the Illinois case was held void only on account of its indefiniteness, and because it was not clear that the commission meant it to be applied State wide. In these cases, by insisting upon the limitations of sections 2 and 3, the representatives of the States practically forced the commission to make an order that carries with it certain degrees of inflexibility, which would not have been necessary if these proceedings were tried upon the theory of a discrimination against interstate commerce, as to which the carrier was authorized to initiate proceedings, because in giving relief in that situation the order would be, I submit, quite possibly different from the form of order required to remove specific discrimination against localities, because the circumstances would be different. The order could have been tentative where the readjustment of the rate structure might appropriately be

tentative. And when the commission finds, in a readjustment of a rate level, that the rates in a given State are out of line; that it casts an undue and discriminatory burden upon interstate commerce; that in order to work out reasonable rates for the carrier, if the State rates remain as they are, the commission will have to force still further discrimination against interstate commerce in order to produce a living return to the carriers the commission might very well make a general order, leaving details to the State, just as the Interstate Commerce Commission, in many cases when it finds discrimination exists, ordered the carriers to go out and produce the result contemplated by the order, subject to the jurisdiction and supervision of the Interstate Commerce Commission; and if that had been done and if the State commissions had admitted that the radical and indefensible difference in rate levels constituted a plain discrimination within the broad principle of the Shreveport doctrine, and under sections 13(3) and 13(4), which gave the railroads the right to complain of a revenue consideration resulting in discrimination against interstate commerce, they would have been met with the temporary flexibility of which that plan, which is temporary, is capable.

Now, as to the scope of the Shreveport doctrine, I desire to read the following, calling particular emphasis to clause 2:

In Illinois Central Railroad *v.* Public Utilities Commission (245 U. S., 493), the court, referring to the Shreveport case (234 U. S., 342), asserted:

"Upon full consideration it there was held:

"1. Under the commerce clause of the Constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.

"2. *Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.*

"3. In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such way as to remove the discrimination; for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the other, it is Congress, and not the State, that is entitled to prescribe the dominant rule.

"4. It is admissible for Congress to provide for the execution of this power through a subordinate body such as the Interstate Commerce Commission, and this it has done by the act to regulate commerce.

"5. Where, in the exercise of its delegated authority the commission not only finds that a disparity in the two classes of rates is resulting in unjust discrimination against interstate commerce but also determines what are reasonable rates for the interstate traffic, and then directs the removal of the discrimination, the carrier not only is entitled to put in force the interstate rates found reasonable, but is free to remove the forbidden discrimination by bringing the intrastate rates to the same level.

"Upon further consideration that decision was approved and followed in American Express Co. *v.* Caldwell (244 U. S., 617).

"The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate pasenger rate in Illinois, is addressed to the removal of discrimination found to be State wide, and gives ample authority for increasing all rates between points in Illinois from 2 cents to 2.4 cents per mile. On the other hand, the State authorities assert that it is not State wide and that the extent to which it is intended to affect the State-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them. Of course, the commission could adjust the remedy to the evil and make the order as broad as the wrongful discrimination; and not improbably it would intend to go that far and no farther. But the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the commission, for they constitute the only authoritative evidence of its action. * * * Had the commission regarded the discrimination as State wide it is but reasonable to believe that it would have said so in its findings. And had it intended to require or authorize a State-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose, which easily could have been done in a few lines."

Now, it is inconceivable, Mr. Chairman, that when this committee used and read into the act the language of the Supreme Court in the Illinois and Shreveport cases; that when those categories set out explicitly by the Supreme Court in the Illinois case are studied, that there can be any question that the use by you of the language that the Supreme Court used meant the same thing that was meant by the court. That far we agree with the State commissions; but that is merely half of the question. The Supreme Court employed a very broad term when it referred to a "discrimination against interstate commerce." Looked at from the viewpoint of an individual shipper, it may be as limited in scope as our friends insist. Looked at from the standpoint of the carrier, it means "revenue." You have added that consideration. Looked at from the standpoint of commerce as a whole—the commerce clause—it means a still broader consideration. These broader considerations you have necessarily brought into the act when you brought the carrier and the general public in express terms into the equation. Our insistence is that the Constitution says what shall be interference or unreasonable discrimination against interstate commerce, and makes it void. The only question is whether the person that is injured by this action is to be given a remedy or not. As I say, the only question is whether or not a remedy shall be given, if we admit undue discrimination against interstate commerce.

Now, with all deference for the chairman's frank and helpful statements throughout this record that it is the intention of this committee to determine whether the Interstate Commerce Commission has tended to transgress the authority which the committee thought was being given in connection with the Shreveport doctrine, consisting in a slight adjustment by the transportation act, is that, Mr. Chairman, all that is involved?

The CHAIRMAN. That is not quite a correct statement of anything I have said.

Mr. JOHNSTON. I do not mean to quote exactly, but as to whether or not the general inquiry by the commission into State rates, based on the contentions of the carriers and the grounds given by the decision——

The CHAIRMAN (interposing). What I have said is this: Members of the committee know what they at least intended to do in the transportation act in this respect. Now, the question—assuming that they are of the same mind still—the question is whether the act has been misinterpreted, and if so, whether it ought to be, or can be clarified so that it will express beyond any controversy the thought of the committee when it was framed; what was in the mind of the committee when the law was framed. Now, I am expressing no opinion with regard to either of those points, but unless the committee changes its mind upon the fundamental propositionn, namely, the interference with State rates—I do not know whether it will or not, but I see no indication of that kind—and then the only question is whether or not we ought to modify the language in which the law is now expressed in order to make it perfectly clear what we meant when the law was passed.

Mr. JOHNSTON. My suggestion at that point was meant to be this: The only modification which the committee or which Congress could make with reference to what is actually discrimination against interstate commerce, which under the Constitution is a question of fact and not of legislation, would be a modification of remedial process, the provision of a remedy.

The CHAIRMAN. What do you mean by the Constitution in that respect? To what provision of the Constitution do you refer?

Mr. JOHNSTON. Why, to the commerce clause, prohibiting the States from undue discrimination against interstate commerce.

The CHAIRMAN. Why, there is no such clause.

Mr. JOHNSTON. I say, the necessary effect of it is that it reposes that authority and duty in Congress.

The CHAIRMAN. The Constitution gives Congress the power and authority to regulate commerce among the States, but it says nothing about discrimination so far as I remember.

Mr. JOHNSTON. It does not say anything about discrimination, but it effectually removes from the power of State agencies any lawful power to impose a burden on the interstate business of any carrier or to impair the usefulness of its facilities for interstate operations. The Constitution says that whether Congress says it or not. The only question is whether Congress will withhold any remedy. Bearing always in mind that the carrier is now entitled to be heard in its own right in rate cases—affirmatively under section 13(3) when State discrimination is alleged—the expression "undue, unjust, and unreason-

able discrimination" is surely within the definition of burden; that may be giving to the word "discrimination" a meaning of the word "burden" when analyzed in the light of the carrier's right to complain and the right of the broad general public to protection. If you eliminate the element of the word "burden" from the relationship arising out of these general aspects, as distinguished from the narrower interest of a locality or individual, or out of the congressional definition as to what is a reasonable rate of return, of course that may leave some question open; but we have not thought that if the Supreme Court should determine in these cases, as we are confident it would if the question were presented on a revenue basis, that the action of these States amounts to an unreasonable discrimination against interstate commerce within the purview of their definition, and was clearly within the Shreveport doctrine, then is not that exactly what it was the intention of the committee to preserve?

The CHAIRMAN. That may be what we intended to perpetuate, but I am not speaking about what power we might exercise. There is a good deal of difference of opinion about that. I am only speaking of the power we have exercised, and you will remember that upon very careful consideration the words "undue burden" which were found in the bill as it passed the House, were eliminated from the bill as it passed Congress finally. We all understood, after a very careful study of the Shreveport cases and the Illinois cases and the Minnesota rate cases, that we would maintain those doctrines and put them as clearly as we could into exact languge. But we did not intend to go beyond that. Possibly we ought to have gone beyond, but that is the view I have been attempting to express all the time—that we tried to embody the doctrine of those cases in this law. The only real change that we made was to use the words "interstate commerce"—that is, speaking about unjust and unreasonable discrimination, we added the words "interstate commerce," because they were used in the Illinois case and, as I remember it, also in the Shreveport case.

Mr. JOHNSTON. That is correct, Senator.

The CHAIRMAN. So far as revenue considerations are concerned, revenue considerations have been present in all rate making; they can not be eliminated from rate making. Everybody, whether it is a State commission or whether it is the Interstate Commerce Commission, must bear in mind that the Constitution of the United States, and the constitutions of the States also, forbid confiscation, the taking of property without due process of law, the taking of property without making just compensation; and I have no hesitation in saying for myself that all rate making involves a consideration of the revenues to be derived from the public service which is being rendered. There is no doubt about that. But that does not mean that under the present law the Federal authority is imposed in the first instance upon the State authority.

Mr. JOHNSTON. Oh, no.

The CHAIRMAN. The State authority must consider the revenue necessities as well as the Federal authority.

Senator STANLEY. Mr. Chairman, as I recall the Constitution, it provides that Congress shall have power to regulate commerce among the several States. The statement of the restriction of that power to "among the States" by necessary implication excludes commerce not among or between between States. And unless a State rate is intimately correlated with an interstate rate so as to become an integral part of it and a part of interstate commerce I do not see where Congress or the Interstate Commerce Commission necessarily has any control over that rate whatever.

Mr. JOHNSTON. Senator, perhaps a quotation from Chief Justice Waite, in Stone *v.* Farmers' Loan & Trust Co. (116 U. S.) will express what I was trying to bring out in that connection. That is the Railroad Commission case—a group of cases decided under that title:

"Nothing can be done by the government of Mississippi which will operate as a burden upon the interstate business of the company or impair the usefulness of its facilities for interstate traffic."

Senator STANLEY. Let us take that up right there—"nothing can be done." Let us take it in that broad sense. Suppose that you have a railroad running through the State of Mississippi from one end of it to the other. Along the side of that railroad is a turnpike, a macadamized road that begins and ends in the State of Mississippi. I put a line of motor trucks on that road and haul for much less than this railroad can haul at a profit, and so divert their traffic to that turnpike. Is not that a burden upon interstate commerce?

Mr. JOHNSTON. No, sir.

Senator STANLEY. Why is it not?

Mr. JOHNSTON. That is merely competition.

Senator STANLEY. It is a burden; it is a loss.

Mr. JOHNSTON. Yes; but it is not a direct burden. It is not direct. The commerce clause was enacted to protect just that situation.

Senator STANLEY. What is the difference, so far as the effect upon the railroad is concerned, between that situation and having another railroad doing a strictly intrastate business at cost or at a loss? Both of them suffer loss, but there is no burden in any other sense.

Mr. JOHNSTON. No, sir; but Congress has finally taken hold of that possibil ty under the commerce clause and avoided that indirect damage or wastefulness, through the transportation act, by controlling the agencies or those which shall become agencies of interstate transportation. Of course, the other case that you assumed would not be a burden or an illegal act under any circumstances.

The CHAIRMAN. I want you to get my idea about it. Possibly I can state it this way: I am not speaking of other remedies which the carriers may have for the imposition of unduly or unreasonably low rates by a State. They have a remedy for such injustice by resorting to the courts, of course. But one of the purposes of section 13, as amended, was to give to the Interstate Commerce Commission the authority to determine for the future what the rate which had been condemned as discriminatory should be. That is one of the new features of the transportation act. In doing that it treats that rate as an interstate rate. It become an interstate rate under the definition stated by Senator Stanley. Whenever that discrimination is found to exist, why, that rate for all the purposes of the law becomes an interstate rate, and the Interstate Commerce Commission can substitute for the condemned rate whatever rate it believes to be just and reasonable. But we did not intend—at least, I did not intend—to give to the Interstate Commerce Commission the authority to declare that a rate discriminated unjustly or unreasonably against interstate commerce simply because that rate might be lower than the interstate rate.

Mr. JOHNSTON. There is no such principle in the regulation of interstate rates, Senator, so that no such content on could be made as to intrastate rate supposed to discr.minate unduly.

The CHAIRMAN. It is urged upon us, very strongly, as you know, through all these hearings that that has been the interpretation which has been put upon this law.

Mr. JOHNSTON. It would be a complete reversal not only of the policy of the Federal Government toward the State rates, but it would be a scrapping of the time-honored policy of considering the reasonableness of interstate rates in their relation to each other.

The CHAIRMAN. That is the point. If that contention had been put upon this law, either by the courts or by the commission, then it may be—I won't say what it would do; but if that be true, it may be that the law ought to be relieved of any obscurity which brought about such an interpretation.

Mr. JOHNSTON. It is inconceivable that that has been the interpretation. I certa nly do not go that far. I go much further than the commission, for I insist earnestly that when you gave the carrier a "right of action" under section 13(3) to complain of an undue discrimination against interstate commerce and when you made it the duty of the commiss.on to inqu re of its own motion in the general public interest in transportation as to undue discriminations arising out of State rates, you went beyond localit.es and ind.viduals. My criticism of the commission is that it did not take as broad a view of the new order and the new point of view arising out of the transportation act as it should; and I th nk it is probably fair to the commission that I should say that when I heard the argument in the Wisconsin rate case I felt that sufficient importance had not been attached to the observation which I have just made, that when you gave the carrier the affirmative right to br ng into issue the reltaionship between State rates and interstate rates and concurrently adopted the construction of the Shreveport case by the addition of the words "undue, unjust, or unreasonable burden against interstate commerce," that necessarily created the mechanism that enabled the commission to consider the complaint in the light of the attitude of the party making the complaint, to wit, the railroad, whose only interest in the situation was one of revenue. The commiss on was treating this solely as if this were a proceeding under the Shreveport case in the interest

and based on the right of localities, whereas I contend for the carriers' right to have that relationship examined—not merely because there was a difference in the rates, but because of the necessary effect of a wide difference in rate level embracing the entire rate structure—as to whether or not that was not an undue discrimination against interest commerce not only within the meaning of the Shreveport case as applied to localities but as applied to the right of the carrier expressly made justiciable and remedial in the interest of the carrier as distinguished from the old proceedings in the interest solely of localities and individuals.

The CHAIRMAN. Of course the carrier is interested, I assume, mainly in the revenue aspect of rates, but we did not give the carrier the right to apply to the Interstate Commerce Commission to fix a State rate because the State rate was not producing its fair share of the burden of transportation. We specifically declined to do that thing. What we did was to give to the carrier the right to complain, but for certain reasons only, namely, that the State rate unjustly and unreasonably discriminated against a person or locality or against interstate commerce. Now, the carrier has not the right to complain upon any other grounds than the ones which we specifically laid down in the statute.

Mr. JOHNSTON. Certainly, sir. But I am able to find no such limitation in the act, and could it have been the idea of the committee that they were to restrict the second paragraph of the categories set out by the Supreme Court in the Illinois case—and perhaps in the Shreveport case—but I have the extract in the Illinois case before me:

"Where unjust discrimination against interstate commerce arises out of the relation of interstate rates to intrastate rates this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier."

Now, the relation of rates there mentioned may, as we think, be interpreted in the light of the definition of a reasonable rate, which has been prescribed by Congress and which becomes the law of the land by virtue of the exercise of its power. When it says that a reasonable rate is that which will produce its fair proportion of the cost of maintaining the agencies of transportation, and the commission in compliance with that admonition fixes as nearly as may be what is a reasonable rate structure, that has some necessary bearing in a proceeding brought by a carrier in its own right, not based on the right of the shipper, and the Supreme Court might well say that in the Shreveport case that is what they meant by a relationship between rates, or that the expression of the commission in fixing a reasonable rate structure under section 15a is an element which they may consider.

The CHAIRMAN. I will put this case to you, in which I will illustrate the thought I have in mind. Take my own State. We have a State commission that has authority over State rates. Suppose that the State commission fixes a rate upon milk from a point of 10 miles out of Des Moines—my home—to Des Moines. Milk is produced at that point. It is brought to Des Moines, and it is consumed in Des Moines. That transportation has no possible relation to the transportation of any other commodity anywhere in the United States. Do you think that we gave to the Interstate Commerce Commission the authority to fix that rate on milk from a point 10 miles out of Des Moines to Des Moines simply because the commission might be of the opinion that it did not produce its fair share of the revenue required by the interstate carriers which were handling milk?

Mr. JOHNSTON. Senator, I do not think Alexander Hamilton himself would make that contention. I do not.

The CHAIRMAN. Reduced to its utmost simplicity, that is the question that we have before us. You will agree that the Interstate Commerce Commission in raising rates as it did, had no authority to raise that rate?

Mr. JOHNSTON. Assuming that there is no relation to interstate commerce involved in the comparison, as you state, I certainly agree with that, sir. And you do not know that the carriers have insisted upon that; it would be stretching the thing if they did.

The CHAIRMAN. We have to consider that, but that is what is being urged upon us all the while—that the commission and the courts have said that under those circumstances and simply because the State did not raise that milk rate 25 per cent or 35 per cent, depending upon the district in which the case may be situated, therefore the commission might raise the rate 25, 35, or 40 per cent.

Mr. JOHNSTON. That is reducing the proposition, Senator, as you say, to a unit. But is there not an important difference when you consider the results

from a totality or multiplicity of concurrent cases as distinguished from a single instance of that sort? I think there is a material legal distinction between the results of an action by a State reflected in the results of the rates as a whole and the result in a single instance. I think they might discriminate as a whole, following any general readjustment upward of the interstate rate level. I can see a distinct relation arising out of rates in their aggregate which might not be discernible in a single rate. That distinction between single and multiple action and results runs throughout our jurisprudence.

The CHAIRMAN. Of course, to my mind that means simply giving the Interstate Commerce Commission the rate-fixing authority for every commodity, whether it is interstate or intrastate, and that I did not intend to do. I do not know whether the other members of the committee intended to do that or not, but I did not.

Mr. JOHNSTON. Certainly the commission did not proceed on that basis.

The CHAIRMAN. But you have just said that that was the basis upon which the commission ought to proceed.

Mr. JOHNSTON. I think I said this, Senator, that I conceive that when there is a substantial change in the interstate rate level, and, following the doctrine of the Shreveport case applied in the light of the fact that the carrier is affirmatively authorized to proceed in its own interest, which is merely revenue, as the Supreme Court has asserted, and not in the exoneration of the right of some one else—that that properly injects a revenue consideration in proceedings of this character.

The commission did not treat it from that standpoint, and in the arguments in the Supreme Court I urged upon counsel for the Interstate Commerce Commission the necessity for pointing out that there was now an affirmative right on the part of the carrier to appear in the redress of its proper grievance, which was of that revenue; and that when Congress properly gave the carriers the power to advance their complaint in their own right arising out of the relationship of rates, I could conceive of no reason why a discrimminaton against interstate commerce as a whole, from the revenue standpoint, could not be given at least some consideration and the attention of the Supreme Court called to that proposition, although the case was not tried and not decided upon that basis. I think it is proper to say—because I am certain that you are interested in getting at the intention of the commission, without reference to its language—that Judge Farrell took that general suggestion up with those who were directing the presentation of the commission's case, and advised me that they felt it would be more proper to restrict their argument to the basis upon which the case was heard and determined. I mention that as showing that what I am urging was not the basis on which the commission determined these cases. I am urging it because I think it is not only sound, but is necessary to sustain the proper relation between rate structures displaced by extraordinary and unavoidable changes.

These vital problems are before the Supreme Court, and nothing that Congress could do would make moot the questions now before the court. You may change this act, but you can not make moot questions of the rights which have arisen under this litigation. The interstate rate base has been put into effect in Wisconsin and other States, and those cases would not become moot because you might amend this act; they must be decided.

The CHAIRMAN. I am not proposing to change the act. I think the act is perfectly plain, but it seems to me that the drift of your argument is that it is not plain, that it means something that we never intended it to mean.

Mr. JOHNSTON. I am merely suggesting, Senator, that when an affirmative right is given to the carrier it must be in the light of its own justiciable interest, and that is revenue——

The CHAIRMAN (interposing). And so it is in every case. There is not any case where it is not a proper consideration, but you have got to get before the proper tribunal.

Senator STANLEY. Let me see if I understand the witness. As I understood you with reference to the very graphic case stated by the chairman, you admitted that that would not be a condition that would justify the Interstate Commerce Commission in adjusting the particular rate?

Mr. JOHNSTON. Oh, certainly not.

Senator STANLEY. But if there were a great number of such rates in the State, all of which were not sufficient to meet the essential revenues of the carrier, if there were hundreds of them, then on account of their great number

and on account of their very vital effect upon the returns to the carrier, the Interstate Commerce Commission could review them?

Mr. JOHNSTON. I think that by reason of the nonaction of the State as a whole, or as applied to any broad class of State traffic clearly comparable to a like class of interstate traffic, following any general advance in interstate rates, resulting in any change in rate level, there must be one of two results; that is, on the one hand that Congress must abdicate its jurisdiction to say what is a reasonable rate structure to sustain interstate commerce, or on the other hand, that the commission must double it on interstate commerce.

Senator STANLEY. If I understand you, if the railroad commission of a State, having jurisdiction of purely intrastate rates, the traffic originating in the State and being delivered in the State, fail to fix a rate upon that character of traffic that would compensate this railroad, then under this act the Interstate Commerce Commission, in order to secure adequate compensation or just compensation to this interstate carrier, would have the right to raise this level of rates within the State as well as without?

Mr. JOHNSTON. I think it would have the right to require the carrier to conform to the interstate rate level, for this reason——

Senator STANLEY (interposing). That the necessity for revenue would supply the apparent lack of jurisdiction?

Mr. JOHNSTON. I would not put it that way. It is not the lack of revenue; it is not what the result to the railroad is going to be; it is what is going to be the result to interstate commerce. The railroad happens to be injured, and by sections 13(3) and 13(4) Congress has asserted that the railroads may initiate the complaint for a plain detriment to interstate commerce also affecting them, just as Congress asserted long ago that a locality might complain of a direct detriment to interstate commerce affecting it.

Senator STANLEY. It is the inadequate return?

Mr. JOHNSTON. Well, yes; because if that is not considered in cases of radical disparity resulting from inaction by a State after substantial raises by the Federal commission, affecting all traffic or broad classes of traffic, Congress must abandon its definition of a reasonable rate which is included in section 15 (a) of the act—that is to say, a rate which bears its proper proportion of the cost of maintaining the service.

Senator STANLEY. And if the State commission fails to establish a compensatory rate, a rate that will save these roads from loss or bankruptcy, then in order to supply this revenue the Interstate Commerce Commission can raise that level of rates——

Mr. JOHNSTON. Or structure——

Senator STANLEY. Or structure—in order to raise it to a compensatory level, a level that will prevent them from doing business at a loss?

Mr. JOHNSTON. Either prevent that result, which I assume your inquiry means is plainly out of relation to the load carried by the interstate rate structure, or force interstate traffic to sustain an undue burden.

Senator STANLEY. And can save the railroads from the alleged injustice of having these State railroad commissions enforce rates that are confiscatory?

Mr. JOHNSTON. Yes, sir; and the question of the reasonableness of a rate involved in a comparison between localities and individuals has been asserted by the Supreme Court repeatedly not to be the question at all; it is the relationship, and not the question of the reasonableness of the one rate or the other.

Senator STANLEY. The discrimination against interstate commerce, as you call it, or the burden upon interstate commerce by virtue of an inadequate rate level, is sufficient to justify the Interstate Commerce Commission in acting, without any affirmative proof of the intimate relation between that traffic and interstate traffic of similar character?

Mr. JOHNSTON. In cases involving all traffic or broad classes of traffic, where the disparity is so obvious and extensive as to be plain, I think so, sir; because Congress has defined what is a reasonable rate structure, and that is a rate structure which produces its reasonable proportion of the cost of maintaining these agencies. A discrimination plainly not sustaining its part of the burden is incontestably an undue discrimination, which the act condemns and for which it gives a remedy.

The CHAIRMAN. That position, of course, sustains the claim that is made by all the State commissions; namely, that it really is section 15 (a) which gives the Interstate Commerce Commission jurisdiction to take possession of all State rates?

Mr. JOHNSTON. Well, I do not see that it goes that far, Senator.

The CHAIRMAN. Why, you have just said that when the State rates did not produce their proper share of the revenue which is required the Interstate Commerce Commission can then take possession and fix the rates.

Mr. JOHNSTON. It would mean a readjustment by the States of their own structures to conform to those rates, and if it were not done there would have to be a remedy somewhere. We know that the question of reasonable rates, State or interstate, are not questions for the courts. The suggestion that the carriers be forced into the courts is merely to deny them any remedy. No honest mind seriously challenges that assertion. Let me quote the language of the Supreme Court in what was then an inquiry, and is now a sound statutory definition, into the question of what is a proper rate structure. In United States *v.* Trans-Missouri Traffic Association (166 U. S., 290) we find this statement:

"What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes on the risk incurred, and the rate itself differs in different localities: Which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be the reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact."

And following that up with the consideration that the reasonableness of rates can not be an issue in questions as to discrimination between localities and individuals, and the Congress having determined that a reasonable rate is one which will produce under honest and efficient management—the same formula adopted by the British railways act—sufficient to sustain the agencies of transportation, that becomes the definition of a reasonable rate and of a reasonable rate structure. And if a rate or a rate structure—because I do not think it can be applied in the case of individual rates—discriminates against interstate commerce and it is unreasonable, because Congress has said that a reasonable rate must bear its fair proportion of the cost of transportation, that becomes unreasonable discrimination in the aggregate; and the carrier now being given a right to advance revenue considerations, that makes it a justiciable element of inquiry before the commission, so that the commission ought to consider these cases upon that theory. That, in entire frankness, was my contention, and I thought it proper to state it.

Senator STANLEY. Suppose it is discovered that under the powers vested in Congress by the Constitution we have no authority to say to the road——

Mr. JOHNSTON. If you have no authority, Senator, and that is not a proper consideration, that will be determined in 60 days or 90 days by the Supreme Court in these cases.

Senator STANLEY. No; the Supreme Court can not determine for a Member of Congress what is constitutional; it can only pass on what we have. That idea seems to be prevalent in the country, that we ought to pass any kind of act that is for the public good and let the Supreme Court say whether it is constitutional or not. That is a matter which each Member must determine for himself. I am not justified in giving my support to an act that I believe contrary to the plain provisions of the Constitution because I think probably the Supreme Court will hold differently; I must obey the Supreme Court's final edict, but it is not the keeper of my conscience or the instructor of my intelli-

gence in advance. I must decide that for myself, just the same as the court would.

Now, the question that is in my mind is whether or not under the interstate commerce clause of the Constitution we have any other right—and I think we have gone far afield already, that we have stretched the interstate commerce clause all out of shape, and we ourselves do not seem to know exactly what it means or to what extent it goes—whether the power to regulate commerce among the States and with foreign countries can be determined by the necessities of the case, and whether any injury to the carrier or any injury to the country will justitfy us in going further in regulating commerce that is not commerce among the States in any sense whatever other than that that commerce might if done at a higher rate have a beneficial effect upon the means of such interstate commerce. It would have some beneficial effect. I suppose, if we were to stop up the canals and do away with the turnpikes that parallel the railroads.

Mr. JOHNSTON. In conclusion and in answer to that, Senator Stanley, I have only two suggestions. The one is that so long as the carriers had the right to control their own revenues by initiating rates—I admit it was a theoretical right and that it was always a hollow technicality; but assuming they had the initiative, because it was up to them to put their own house in order, when that right was substantially taken away from them——

Senator STANLEY (interposing). I would give it back to them to-morrow if I could.

Mr. JOHNSTON. And the power to initiate and fix rates—practically the exclusive power, since the only practical remedy of the carriers to initiate a general advance is by resorting to a violation of the Sherman Act, to which I have referred—was reserved to public authority, and that same public control was then extended to a control of more than 90 per cent of the expenditures——

Senator STANLEY (interposing). I did not mean that I would let two carriers fix the rates between them; I would let a carrier fix any rate it chose and then let the Interstate Commerce Commission pass upon the reasonableness of that rate.

Mr. JOHNSTON. Of course it could not do that, Senator. The interstate revenues of many roads are almost wholly competitive; they can not fix the rate without similar and concurrent action by or affecting their competitors.

Senator STANLEY. You do not understand me. I would let any road fix any rate it chose.

Mr. JOHNSTON. I mean the two would have to get together.

Senator STANLEY. No; they would not. They would probably find it advisable to do so, but there is no legal compulsion upon them. One road might offer to carry traffic for less than the other.

Mr. JOHNSTON. And the road with the lower rate would secure the traffic. That would mean that rates would be static or diminishing and could never be raised.

Senator STANLEY. I do not mean that we are bound to let any carriers pool their interests and agree among themselves as to what they will charge.

Mr. JOHNSTON. They are supposed to do that now. I am not speaking from the confessional, but I do not know of any other way by which they can compile and chance upon the same schedule of rates unless they have been back in a room somewhere and agreed upon it. Otherwise it would be a remarkable coincidence if they hit upon the same rate. But I say that when the public, acting through its Federal agency, has assumed those functions and taken control of the service, of expense, of wages, and practically all the functions of the railroads involving well up toward 90 per cent of their gross expenditures, not to accompany that with revenue considerations of adequate character is merely, of course, to do what the Supreme Court of the United States has asserted would be to exercise all of the privileges of ownership with none of its responsibilities.

And so we make answer from that standpoint, if you throw these carriers back to the courts, as Mr. Thorne suggests—he says they will take care of the situation. We know that rate making is not a justiciable inquiry, and for a fundamental reason. The reason you adopted the interstate commerce act was for the purpose of uniformity. One State or one jury would arrive at one conclusion upon that matter and another State and another jury would arrive at another conclusion. You passed the commerce act to avoid any such complexity in results.

It has taken years for the commission to formulate its valuations. Yet valuation would be involved in every trial in court. I know that court conditions

are not adapted to rate and revenue hearings. The judicial system was built up under conditions that involved no such commercial inquiry as this, with an accounting system which does not require a separation of accounts. The Supreme Court asserted in the Kansas City Southern case that this duty to report involved intrastate results and operations and revenue, and that it was doubtful if they could be separated. Well, they have to be separated to sustain a case in a State court. What good would it do a competing road to go into a State court, or a Federal court, or anywhere, and establish the right to raise its rates, unless its competitor by a similar proceeding arrived at exactly the same result? It can not raise its rates without its competitor, and there is no such thing as two railroads joining in the same complaint up to date, so far as I know. So the relegation of these matters, which are not justiciable in their character, to the courts, is simply to deny them a remedy and to put this whole question of rehabilitation and regulation on an impossible basis. This association is concerned, as I say, in sustaining revenue indirectly, as a necessary step in the rehabilitation of these properties, with the hope that Congress will go forward with the important piece of work that has been begun.

Senator STANLEY. As I understand you, I do not know that you complain, but you say we have fixed rates and fixed wages, and taken away from you this, that, or the other power which you formerly had. I have heard a great deal of that, and it is true, to such an extent that really the Government is practically running the railroads. The railroad operators have very little discretion in the management of these carriers. And with that power already vested in the Government, it is absolutely necessary now that the Government should go a little further and fix rates, and fix them within and without the States? Is that it?

Mr. JOHNSTON. Well, that it should not exert its power of regulation to depress them below a point which will enable the agencies to survive, which they control in all other particulars.

Senator STANLEY. Do you not think we have two chances to remedy it? One by doing what you say, giving the Interstate Commerce Commission the right to fix the level of rate structures within the State, and the other by going back and restoring to these roads some of the power to attend to their own business that we have taken away from them? What do you think of going in that direction for a while, undoing a little that we have done instead of doing a lot more?

Mr. JOHNSTON. Never, Senator, in the history of political institutions has any such reversal of established policy been witnessed without revolution.

Senator STANLEY. Well, this is not a policy. It is a Government experiment. It is two acts.

Mr. JOHNSTON. If that should be done, I have no doubt the roads themselves would have to set up agencies in their own households that would be fairly equivalent to everything that Congress has done in this act. They can not survive in open competition against each other, as Judge Cooley said.

Senator STANLEY. Do you think they could not live in an atmosphere and a soil in which they grew to such wonderful wealth?

Mr. JOHNSTON. Not longer, Senator, if you mean uncoordinated competition.

That is all, Mr. Chairman. Would there be any objection to my inserting the authorities to which I have referred?

The CHAIRMAN. No; on the contrary, we should be glad to have them.

(The sections of the British railroad act referred to by Mr. Johnston are as follows:)

BRITISH RAILWAYS ACT, 1921.

REORGANIZATION OF RAILWAY SYSTEM.

1. (1) With a view to the reorganization and more efficient and economical working of the railway system of Great Britain railways shall be formed into groups in accordance with the provisions of this act, and the principal railway companies in each group shall be amalgamated, and other companies absorbed in manner provided by this act.

(2) The groups to be formed shall be those specified in the first column of the first schedule to this act, and as respects the several groups the railway companies to be amalgamated (in this act referred to as constituent companies) shall be those set out in relation to each group in the second column of that schedule, and the companies to be absorbed (in this act referred to as

subsidiary companies) shall be those set out in relation to each group in the third column of that schedule, and the companies constituted by such amalgamation are in this act referred to as amalgamated companies.

2. (1) The constituent companies in any group may on or before the first day of January, nineteen hundred and twenty-three, submit to the minister of transport (hereinafter referred to as the minister) an amalgamation scheme framed in accordance with the provisions of this act which has been agreed to by all those companies.

(2) The minister shall refer to the amalgamation tribunal hereinafter constituted any scheme so submitted to him, and the tribunal, unless it appears to them that the scheme does not conform with the requirements of this act or that the provisions of this act relating to the procedure preliminary to the submission of an agreed scheme have not been complied with, shall confirm the scheme.

(3) If the constituent companies in any group fail to submit an agreed amalgamation scheme framed in accordance with the provisions of this act on or before the said date, a scheme for the amalgamation of the constituent companies in that group shall be prepared and settled in accordance with this act by the amalgamation tribunal.

3. (1) An amalgamation scheme under this act—

(a) Shall provide for the incorporation of the amalgamated company under an appropriate name, with power to hold land for the purposes of the company and make such provisions as appear necessary or expedient with regard to the share and loan capital of the amalgamated company and the vesting of the property, rights, powers, duties, and liabilities, whether statutory or otherwise, of the constituent companies; and

(b) Shall provide generally as to the terms and conditions of amalgamation and for the winding up of the constituent companies, including the allocation to holders of securities of the constituent companies in substitution therefor and in satisfaction of all claims arising thereunder, of such securities of the amalgamated company, and of such amounts as may be specified in the scheme; and

(c) Shall incorporate Part V of the railways clauses act, 1863, subject to the provisions of this act; and may incorporate with or without modification any of the provisions of the companies clauses consolidation act, 1845, and the acts amending that act, and such modifications may provide that any committees appointed under section ninety-five of the companies clauses consolidation act, 1845, may comprise persons who, though not directors of the company, are proprietors and possess such other qualifications (if any) as may be provided by the scheme; and

(d) Shall give effect to the provisions contained in the second schedule to this act with respect to the direction of the amalgamated company, and may, with the consent of the proprietors, provide for the payment of compensation out of the assets of a constituent company to the directors of the company who suffer loss by abolition of office; and

(e) Shall contain such provisions with respect to the management of any superanuation, pension, providend, widows' and orphans', and other benefit fund or funds established by any constituent company as may be necessary in consequence of amalgamation, so, however, as to preserve in all other respects the management of such funds unaltered until other provision is made by Parliament; and

(f) Shall incorporate the provisions contained in the third schedule to this act with respect to existing officers and servants; and

(g) May make such incidental and supplemental provisions as appear necessary or expedient in order to give full effect to the provisions of the scheme and the purposes of this act: *Provided*, That the scheme may provide for the postponement for a period not exceeding five years, or, if for special reasons the amalgamation tribunal think fit, ten years, of the winding up of a constituent company with or without any change in the name of the company in order to enable such company to continue to exist for the purpose of receiving and holding any securities of the amalgamated company for the benefit of any class or classes of the holders of any loan or share capital of the constituent company or of any company the interest or dividends of which are guaranteed by or secured on the revenues of the constituent company, according to their respective rights and interests in pursuance of and in accordance with any arrangement which may be approved by the amalgamation tribunal and included in the scheme, and during such postponement of winding up a constituent company

shall cease to be a railway company within the meaning of section two hundred and sixty-seven of the companies (consolidation) act, 1908, but any securities of the constituent company which are at the date of amalgamation securities in which trustees are by law entitled to invest trust funds shall continue to be such securities.

(2) With respect to the western group, the following provision shall have effect:

(a) The amalgamation scheme shall provide for constituting the Great Western Railway Company, the amalgamated company, and for amalgamating therewith the other constituent companies in the group;

(b) For the purposes aforesaid the scheme may provide for increasing all or any of the existing classes of loan and share capital of the Great Western Railway Company or creating new classes of loan or share capital of that company, with such rights, priorities, and conditions as may be specified in the scheme, and for allocating to the holders of the loan and share capital of the other constituent companies additional and new capital of the Great Western Railway Company so created to such amounts and in such manner as may be provided by the scheme;

(c) Notwithstanding anything in any special act affecting the Great Western Railway Company or the holders of any class of loan or share capital in that company, the additional capital of each class shall form part of and rank pari passu with the existing capital of that class, and any new class of capital may, with the consent of the majority in value of the holders of any class of security affected, rank before any existing class of capital;

(d) Paragraph (a) of the foregoing subsection, so far as it relates to the incorporation of the amalgamated company, shall not apply, and paragraph (b) thereof, so far as it relates to the winding up of the constituent companies, shall not apply to the Great Western Railway Company.

4. (1) The constituent companies in any group may, on or before the first day of January, nineteen hundred and twenty-three, submit to the minister a scheme or schemes framed in accordance with the provisions of this act for the absorption by the amalgamated company to be formed by the amalgamation of those constituent companies of the subsidiary companies which, under this act, are to be absorbed by that amalgamated company, or any of those subsidiary companies, on terms agreed to by the subsidiary companies to which the scheme or schemes may relate.

(2) The minister shall refer to the amalgamation tribunal any scheme so submitted to him and the tribunal, unless it appears to them that the scheme does not conform with the requirements of this act, or that the provisions of this act relating to the procedure preliminary to the submission of an agreed scheme have not been complied with, shall confirm the scheme.

(3) If the constituent companies in any group fail, on or before the said date, to submit one or more agreed schemes framed in accordance with the provisions of this act for the absorption of all the subsidiary companies which are to be absorbed by the amalgamated company to be formed by the amalgamation of those constituent companies, a scheme for the absorption of any subsidiary company with respect to which an agreed absorption scheme framed in accordance with the provisions of this act has not been made shall be prepared and settled in accordance with this act by the amalgamation tribunal.

5. An absorption scheme under this act—

(a) Shall provide in such manner as appears necessary or expedient for the transfer to the amalgamated company of all the property rights, powers, duties, and liabilities, whether statutory or otherwise, of any subsidiary company to which the scheme relates; and

(b) Shall provide for the consideration to be given to the subsidiary company or companies, and generally as to the terms and conditions of the transfer, and may provide for the consideration consisting in whole or in part of securities of the amalgamated company; and

(c) Shall provide for the winding up of the subsidiary company or companies, and may provide on any such winding up for the holder of any securities of the subsidiary company receiving in substitution therefor and in satisfaction of all claims arising thereunder such securities of the amalgamated company forming part of the consideration for the transfer of the undertaking, and of such amounts, as may be specified in the scheme, and may, with the consent of the proprietors, provide for the payment of compensation out of the assets of a subsidiary company to the directors of the company who suffer loss by abolition of office; and

(d) Shall incorporate the provisions of Part V of the railways clauses act, 1863, subject to the provisions of this act; and

(e) Shall contain such provisions with respect to the management of any superannuation, pension, provident, widows' and orphans', and other other benefit fund or funds established by any subsidiary company as may be necessary in consequence of absorption, so, however, as to preserve in all other respects the management of such funds unaltered until other provision is made by Parliament; and

(f) Shall incorporate the provisions contained in the third schedule to this act with respect to existing officers and servants; and

(g) May make such incidental and supplemental provisions as appear necessary or expedient in order to give full effect to the provisions of the scheme and the purposes of this act.

6. For the purpose of determining terms and conditions of amalgamation between any constituent companies or of the transfer of the undertaking of any subsidiary company, the amalgamation tribunal shall take into consideration all the circumstances of the case, and in particular the value of a net revenue-earning basis of each of the constituent and subsidiary companies as a separate company, and its value as a component part of the amalgamated company; so, however, that regard shall not be had to economies or accretions of traffic or other circumstances tending to enhance its value as such component part attributable solely to the provisions of this act relating to amalgamation and absorption: *Provided*, That in the case of the line of one company being worked by another company under an arrangement whereby percentage of the gross receipts of the line so worked is payable to the owning company, the amalgamation tribunal in determining the terms and conditions of transfer shall not take into account any higher charging powers than those authorized in respect of the line under the statutory provisions in force in the year nineteen hundred and thirteen.

7. (1) Every amalgamation scheme and every absorption scheme shall be so framed as to come into operation on the first day of July, nineteen hundred and twenty-three, after consulation with the minister, may fix: *Provided*, That each amalgamation scheme shall be deemed to come into operation immediately before the absorption scheme or schemes by whch subsidiary companies are absorbed by the amalgamated company formed by the amalgamation scheme.

(2) Before an agreed amalgamation or absorption scheme is referred to the amalgamation tribunal, the scheme shall be submitted to the proprietors and debenture stockholders of each constitutent and subsidiary company affected thereby in the manner provided in order sixty-two of the standing orders relative to private business in the House of Commons, and that order shall apply accordingly as if the scheme were a bill, and any statement required by the order to be deposited at the private bill office shall be deposited with the amalgamation tribunal.

(3) A scheme under this part of this act shall, when confirmed or settled by the amalgamation tribunal, be binding on all persons and have effect as if enacted in this act, and where any such scheme provides for the substitution of any securities of an amalgamated company for securities of a constituent or subsidiary company any trustee or other person acting in a fiduciary capacity who at the date of the amalgamation or absorption held and was entitled to hold any securities of the constituent or subsidiary company shall be entitled to hold the securities of the amalgamated company which may be substituted therefor.

(4) No stamp duty shall be payable in respect of any amalgamation or absorption scheme.

(5) Printed copies of every proposed amalgamation scheme and absorption scheme submitted to the minister or prepared by the amalgamation tribunal in accordance with the provisions of sections two and four of this act, respectively, shall be placed on sale at such places and at such price as the minister may direct, and notice that such copies are on sale and the places where they may be obtained shall be published in the London and Edinburgh Gazettes, and no such scheme shall be confirmed or settled by the amalgamation tribunal until the expiration of twenty-one days after the publication of such notice.

(6) Every amalgamation and absorption scheme shall be deemed to be statutory rules within the meaning of the rules publication act, 1893; but nothing in this provision shall be construed as making any such scheme statutory rules to which section one of that act applies.

(7) If, as respects any group, the amalgamation tribunal postpones the date on which the amalgamation and absorption schemes relating to the group are to come into operation to a date later than the said first day of July, then, during the period of postponement, the undertakings of all the constituent and subsidiary companies in the group may, and shall, if the amalgamation tribunal so direct, be used, worked, managed, maintained, and repaired as one joint undertaking, and the net receipts of the joint undertaking shall be distributed amongst the constituent and subsidiary companies upon such terms and subject to such conditions and in such proportions as may be agreed upon by the several companies with the approval of the amalgamation tribuntal or in default of agreement as may be determined by the amalgamation tribunal, and the following provisions of this act relating to amalgamated companies shall apply as if such joint undertaking were the undertaking of an amalgamated company and as if the governing body of the joint undertaking were an amalgamated company.

8. (1) Any two or more constituent companies in any group may, at any time after the passing of this act, submit to the minister for reference to the amalgamation tribunal a preliminary scheme for the amalgamation of those companies, or for the absorption by one of such companies of the other or others of them.

(2) A constituent company may, at any time after the passing of this act, submit to the minister for reference to the amalgamation tribunal a preliminary scheme for the absorption by that constituent company of any subsidiary company or companies in the same group upon such terms as may be agreed between those companies.

(3) The amalgamation tribunal shall approve any such preliminary scheme so referred to them unless it appears to them that the provisions of this act relating to the procedure preliminary to the submission of a scheme have not been complied with, or unless, after hearing such of the other constituent companies in the group as desire to be heard, the tribunal consider the scheme to be inconsistent with or prejudicial to an amalgamation scheme for the whole group made in accordance with the provisions of this act.

(4) Every such preliminary scheme shall, subject to such provisions in that behalf as may be contained therein, come into operation forthwith after it is approved.

(5) Subject to the provisions of this section, all the provisions of this part of this act relating to amalgamation and absorption schemes shall, with the necessary adaptations, apply respectively to preliminary amalgamation and absorption schemes except that a preliminary amalgamation scheme shall, instead of giving effect to the provisions contained in the second schedule to this act with respect to the direction of the company, make such alternative provision in that respect as may be agreed between the companies to be amalgamated.

(6) In the confirmation or preparation and settlement of the amalgamation scheme for the group the amalgamation tribunal shall give effect to any preliminary scheme approved by them, but so that the interests of the other constituent companies in the group shall not be prejudiced thereby.

(7) Any company formed by a preliminary amalgamation scheme shall be deemed to be a constituent company for the purposes of this act in lieu of the companies amalgamated by the scheme, and shall not be deemed to be an amalgamated company within the meaning of this act.

9. (1) For the purposes of dealing, in accordance with the foregoing provisions of this part of this act, with schemes of amalgamation and schemes of absorption, there shall be constituted a tribunal, to be called the railways amalgamation tribunal (in this act referred to as the amalgamation tribunal) consisting of three commissioners, who shall hold office until all matters with respect to which they have jurisdiction under this part of this act have been settled.

(2) The first commissioners shall be Sir Henry Babington Smith, G. B. E. (who shall be president), Sir William Plender, G. B. E., and George John Talbot, Esq., K. C., and in the event of any vacancy occurring amongst the commissioners for the time being by death, resignation, or otherwise, before the expiration of the term of office of the commissioners, His Majesty may appoint a person to fill the vacancy.

(3) The amalgamation tribunal shall be a court of record and have an official seal, which shall be officially and judicially noticed, and may act notwithstanding any vacancy in their number, and two shall be a quorum.

(4) Any commissioner and any person authorized by the amalgamation tribunal may hold such local or other inquiries as appear necessary to the amalgamation tribunal for the purpose of the proper execution of their duties under this act, and before any such inquiry is held the amalgamation tribunal shall give such public notice as they think best adapted for informing persons affected of the date when and the place where the inquiry will be held.

(5) The provisions of the arbitration act, 1889, with respect to—

(a) The administration of oaths and the taking of affirmations; and

(b) The correction in awards of mistakes and errors; and

(c) The summoning, attendance, and examination of witnesses and the production of documents; and

(d) The costs of the reference and award shall apply in respect of any proceedings before the amalgamation tribunal, and (except with regard to the correction of mistakes and errors in awards) at any inquiry under this section; but, save as aforesaid, the arbitration act, 1889, shall not apply to proceedings before the amalgamation tribunal or at any inquiry under this section.

(6) The amalgamation tribunal or person holding an inquiry under this section shall take into consideration all objections to an amalgamation or absorption scheme, or in respect of the subject matter of the inquiry, which may have been lodged by any class or body of persons within the prescribed time and in the prescribed manner, and where any objections have been so lodged shall hear any objectors whom the tribunal consider entitled to appear.

(7) The amalgamation tribunal may, and if so ordered by the court of appeal or court of session shall, state in the form of a special case for determination by the court of appeal or court of session, as the case may require any question of law which may arise before them; and the decision of the court of appeal or court of session shall be final unless that court give leave to appeal to the House of Lords, which leave may be given on such terms as to costs or otherwise as the court of appeal or court of session may determine.

(8) Subject as aforesaid, the amalgamation tribunal may, with the approval of the lord chancellor and the lord president of the court of session, make rules regulating their own procedure and the procedure at any inquiry under this section.

10. (1) The amalgamation tribunal may appoint a clerk and, subject to the consent of the treasury as to numbers, such other officers and servants as they consider necessary for assisting them in the proper execution of their duties.

(2) There shall be paid to the commissioners and to any such clerk, officer, or servant as aforesaid such remuneration as the minister, with the approval of the treasury, may determine, not exceeding in the aggregate thirty-five thousand pounds.

(3) Any such remuneration and any other expenses of the amalgamation tribunal shall be defrayed in the first instance by the minister out of moneys provided by Parliament, but on the coming into operation of the amalgamation schemes under this part of this act the amount thereof, with interest at such rate as the treasury may appoint, shall on demand be repaid to the minister by the amalgamated companies in such proportions as the amalgamation tribunal may determine.

11. (1) The minister shall, out of moneys to be provided by Parliament, place on deposit with Messers. Glyn, Mills, Currie and Company, bankers in the city of London, the sum of sixty million pounds to the credit of a deposit account entitled "The railways' compensation account," and that sum shall be payable by two equal installments of thirty million pounds each, of which the first installment shall become due on the thirty-first day of December, nineteen hundred and twenty-one, and the second installment shall become due on the thirty-first day of December, nineteen hundred and twenty-two, and each such installment shall be paid within fifteen days after it so becomes due.

(2) The payment of the said sum shall be a full discharge and in satisfaction of all claims which might otherwise have been made by any railway company in Great Britain to which this section applies for compensation under the regulation of the force act, 1871, the ministry of transport act, 1919, or otherwise arising out of or in respect of the possession by the Crown of the undertaking, railroad, or plant of such railway company or the exercise of the powers conferred by those acts: *Provided*, That the rights and liabilities of the Crown or the minister on the one hand, and of the railway companies on the other hand, under the terms of the agreements or arrangements relating to the possession by the Crown of the railways, shall, so far as regards the making

good of any deficiency in the net receipts of the companies (including the payment of interest) up to the end of the period of possession, and in relation to any sums expended and liabilities incurred by the companies in respect of repairs and renewals effected before the end of that period in accordance with the said agreements and arrangements, subsist and continue.

(3) The moneys so placed to the credit of the said account in accordance with the provisions of this section, together with any interest which may accrue thereon, shall, subject to the provisions of the next succeeding section, be distributed amongst the railway companies in Great Britain to which this section applies, in accordance with such scheme or schemes of allocation as may be agreed to by such companies, or, failing agreement, as may be settled from time to time by the amalgamation tribunal, and the amalgamation tribunal shall, on request, issue under their seal a certificate authenticating any such scheme or schemes as may have been agreed or settled, and Messrs. Glyn, Mills, Currie and Company shall pay to each of the said companies forthwith the amount or amounts allocated to such companies in accordance with any such scheme bearing the seal of the amalgamation tribunal, and any sum allocated to any company under any such scheme bearing the seal of the amalgamation tribunal, and any sum allocated to any company under any such scheme shall be deemed to become, or to have become, due to the company on the date on which the installment out of which the sum is payable becomes or became due.

(4) All moneys received by any of the said railway companies in pursuance of any such scheme of allocation may be applied in such manner and in such proportions and at such time or times as the directors of the company may determine as a reserve fund for meeting contingencies, or for repairing, improving, or maintaining any of the property of the company, or for payment of interest or dividend, or for any other purpose for which the earnings of the company may be properly applied.

(5) Notwithstanding anything in the income tax acts, any sum received by a railway company out of the said account shall not be charged to income tax except so far as any part thereof may, at any time, be applied for the payment of interest or dividends, and the amount so applied shall be assessed and charged to income tax for the year of assessment next following the end of the year or period in respect of which such interest or dividends were paid: *Provided*, That if the total amount so applied by the railway companies for the payment of interest and dividends in respect of the three years nineteen hundred and twenty-one, nineteen hundred and twenty-two, and nineteen hundred and twenty-three is less than thirty million pounds the deficiency—that is to say, the amount representing the difference between the said total amount and the sum of thirty million pounds—shall be assessed and charged to income tax for the year 1924-25.

(6) For the purpose of such assessment, the deficiency shall be apportioned in manner hereinafter mentioned amongst such of the railway companies as have applied for the payment of interest and dividends in respect of the said three years less than one-half of the amount received by them out of the said account, and each such company shall be assessed and charged to income tax on the amount so apportioned to it: *Provided*, That where any company so assessed applies for the payment of interest or dividends in respect of any year subsequent to the year nineteen hundred and twenty-three any part of the sums received by it from the said account, so much of the amount so applied as is equal to the amount for which the company was assessed under the foregoing provisions of this subsection shall not be charged to income tax.

(7) For the purpose of such apportionment there shall, in the case of each of the companies amongst which the deficiency is to be apportioned, be deducted from one-half of the sum received by the company out of the said account the amount applied by that company for the payment of interest and dividends in respect of the said three years; and the deficiency shall be apportioned amongst the several companies in proportion to the amounts of the several residues so obtained.

(8) After an amalgamation scheme comes into operation any sums received out of the said account, and any amounts applied for the payment of interest or dividends by a constituent or subsidiary company in the group to which the scheme relates, shall, for the purposes of this section, be treated as having been so received or applied by the amalgamated company formed by the scheme.

(9) All assessments to income tax in respect of sums applied for the payment of interest or dividends, or in respect of an apportioned share of the de-

ficiency under this section, shall be made by the special commissioners of income tax; and the amount of any such assessment shall be paid, collected, and levied in like manner as any other assessment made by the special commissioners.

(10) The railway companies to which this section applies are the railway companies of whose undertakings possession is retained under the ministry of transport act, 1919, up to the end of the period of possession; that is to say, the period ending on the fifteenth day of August, nineteen hundred and twenty-one, during which possession of those undertakings is under the said act authorized to be retained by the minister.

12. Out of the first installment of thirty million pounds referred to in the last preceding section—

(a) The sum of twenty-four million five hundred thousand pounds shall be forthwith distributed amongst the companies to which the said section applies (other than the companies referred to in subsection (3) of this section) in proportion to the net receipts of those companies, respectively, during the year nineteen hundred and thirteen, covered by the first seven items in account No. 8 of the first shcedule to the railway companies (accounts and returns) act, 1911, as already agreed for the purpose of the compensation accounts between the Government and the railway companies (but excluding any receipts classified as miscellaneous receipts (net) in the said account No. 9), supplemented by—

(i) The inclusion in such net receipts of any sums placed to the credit of a suspense account in respect of the four per cent increase in rates out of the revenue of nineteen hundred and thirteen; and

(ii) The addition of any sums payable by the Government to the said companies, respectively, for the pear nineteen hundred and twenty under the agreements or arrangements aforesaid in respect of interest on capital expenditure; and

(b) The sum of five hundred thousand pounds shall be set aside for the payment thereout of such compensation as may be awarded by the amalgamation tribunal to any of the companies referred to in subsection (3) of this section; and

(c) The sum of five million pounds shall be set aside for distribution, subject as hereinafter provided, amongst those railway companies to whom the said section applies (other than the companies referred to in subsection (3) of this section) and who are able to show to the satisfaction of the amalgamation tribunal that they have suffered abnormally by the standardization of rates of pay, hours of duty, and other conditions of service. For the purpose of determining the basis of compensation owing to abnormal increase in working expenses due to such standardization, the cost of salaries and wages for the last four months of the year nineteen hundred and twenty-one of the railways to which the said section applies compared with the cost of salaries and wages of the same railways for the same four months of the year nineteen hundred and thirteen shall be ascertained, and the average percentage increase shall be deemed to be the normal ratio of increase for the purpose of this section. Any company whose ratio of increase is above such normal ratio shall make out a claim showing the extent above the normal ratio of increase to which it has suffered by standardization during the said four months. The claims of all the companies presenting such claims shall be considered by the amalgamation tribunal, who shall allocate amongst such last-mentioned companies, in proportion to the claim which they may establish to the satisfaction of the amalgamation tribunal, the said sum of five million pounds of such lesser sum as may be sufficient to satisfy such claims as so established; and

(d) Any sum remaining out of the two said sums of five hundred thousand pounds, and five million pounds, after payment to the various railway companies to whom the said section applies (other than the companies referred to in subsection (3) of this section), under the two last preceding paragraphs and including any interest which may have accrued, shall be distributed between the whole of the companies entitled to participate in the said sum of twenty-four million five hundred thousand pounds as if such sums and the interest thereon had been added to the twenty-four million five hundred thousand pounds.

(2) Out of the second instalment of thirty million pounds payable under the said section of this act—

(a) The sum of twenty-five million pounds shall be distributed amongst those companies to which the said section applies (other than the companies referred

to in subsection (3) of this section), and who on the thirty-first day of December, nineteen hundred and twenty, were in arrear in respect of the maintenance and renewal of way and works and/or rolling stock (abstracts A and B set out in the form of accounts scheduled to the railway companies (accounts and returns) act, 1911) in proportion to the extent to which they were so in arrear. The amount of such arrear shall be ascertained in accordance with the arrangements agreed between His Majesty's Government and the railway companies in Great Britain in respect of arrears of maintenance and renewal work, as set in addendum 2 of Command Paper 654 (1920).

(b) The sum of five million pounds shall be set aside for distribution, subject as hereinafter provided, amongst those railway companies who shall have established or shall establish to the satisfaction of the amalgamation tribunal their right to participate in the distribution of the sum of five million pounds mentioned in subsection (1) (b) of this section in accordance with the provisions of that subsection, except that the words "the year nineteen hundred and twenty-two" shall be deemed to be substituted for the words "last four months of the year nineteen hundred and twenty-one" and the words "year nineteen hundred and thirteen" shall be deemed to be substituted for the words "same four months of the year nineteen hundred and thirteen" in the said subsection.

(c) Any sum remaining out of the five million pounds after paying to the various railway companies under the preceding paragraph, including any interest which may have accrued, shall be divided between the whole of the companies to whom the said section applies (other than the companies referred to in subsection (3) of this section) as if such sum and the interest thereon had been added to the twenty-four million five hundred thousand pounds referred to in subsection (1), paragraph (a).

(3) No portion of the sum of sixty million pounds referred to in the said section of this act or the interest thereon shall be allocated to any company which is neither itself conducting its traffic nor maintaining its undertaking unless the tribunal shall determine, on the application of such company, that such company would, but for the provisions of the last preceding section, be entitled to receive compensation from the minister of the Crown under the regulation of the forces act, 1871, the ministry of transport act, 1919, or otherwise arising out of or in respect of possession of their undertaking by the Crown, but no such application shall be made after the thirtieth day of April, nineteen hundred and twenty-two. The amount of such compensation shall be determined by the tribunal and shall be paid out of the said sum of five hundred thousand pounds.

13. (1) It shall be lawful for any constituent company, and, with the consent of the constituent companies in the group, for any subsidiary company prior to amalgamation under this act, with the sanction of the minister and notwithstanding any limitation on the powers of borrowing of the company, to borrow on mortgage of its undertaking by means of terminable securities to such amount at such rate of interest, redeemable within such period, and subject to such conditions as the minister may sanction, with the consent of the majority in amount of the proprietors and of the holders of the existing mortgage securities of the company at special meetings called for the purpose, but the amount so borrowed shall in no case exceed one-eighth of the existing mortgage securities of that company.

(2) The constituent companies in any group may, in like manner and subject to the like conditions, guarantee any such securities issued by any one or more of them, or by any one or more subsidiary companies in the group.

(3) Where a scheme of amalgamation or absorption has been referred to or is being prepared or has been confirmed or settled by the amalgamation tribunal the powers under this section shall not be exercised by any constituent or subsidiary company affected by the scheme without the consent of the amalgamation tribunal.

14. (1) An amalgamated company shall, for the purposes of the railway clearing house and the acts relating thereto, be deemed to be a part to the clearing system in place of the constituent and subsidiary companies from which it was formed.

(2) The railway clearing house may submit to the amalgamation tribunal and the amalgamation tribunal shall settle a scheme to effect such alterations of the acts and regulations applicable to the railway clearing house as may be rendered necessary by reason of the constitution of amalgamated companies.

(3) The provisions of this part of this act applicable to an amalgamation scheme when settled by the amalgamation tribunal shall apply to a scheme under this section.

(4) The provisions of the third schedule to this act shall apply to persons who were at the date of the introduction of the bill for this act officers and servants of the railway clearing house as if the railway clearing house were an amalgamated company and those officers and servants were officers and servants of a constituent company.

15. For the purposes of the provisions of the trustee act, 1893, and the trusts (Scotland) acts, 1861 to 1910, relat ng to the securit es in which trustees are author zed to invest trust funds, an amalgamated company or a company constituted by a preliminary amalgamation scheme shall be treated as if it were a railway company in Great Britain incorporated by spec al act of Parliament and had, 'n each of the ten years immed'ately before the date of amalgamation, paid a dividend at the rate of not less than three per centum per annum on its ordinary stock.

* * * * * * *

ADJUSTMENT OF CHARGES TO REVENUE.

58. (1) The charges to be fixed in the first instance for each amalgamated company shall be such as will, together with the other sources of revenue, in the opinion of the rates tribunal, so far as practicable yield, with efficient and economical working and management, an annual net revenue (hereinafter referred to as the standard revenue) equivalent to the aggregate net revenues in the year nineteen hundred and thirteen of the constitutent companies and the subsidiary companies absorbed by the amalgamated company, together with—

(a) A sum equal to five per cent on capital expenditure forming the basis on which interest was allowed at the end of the period during which the constituent companies and subsidiary companies were in the possession of the Government; and

(b) Such allowance as may be necessary to remunerate adequately any additional capital which may have been raised or provided in respect of expenditure on capital account incurred since the first day of January, nineteen hundred and thirteen, and not included in the expenditure referred to in the last preceding paragraph, unless it can be shown that such expenditure has not enhanced the value of the undertaking; and

(c) Such allowance as appears to the rates tribunal to be reasonable in respect of capital expenditure (not being less than twenty-five thousand pounds in the case of any work, and not being capital expenditure included in paragraph (a)), on works which enhance the value of the undertaking, but which had not at the beginning of the year nineteen hundred and thirteen become fully remunerative: *Provided*, That, in determining the sum which charges will, with efficient and economic work'ng and management. yield, the tribunal shall, with a view to encouraging the taking of early steps for effecting economies in working and management expenses rendered possible by or in anticipat'on of amalgamation, take into consideration the economies effected by such steps already taken, and shall make such allowance in respect thereof as the tribunal may consider fair and equitable to an amount not exceeeding thirty-three and one-third per cent of such economies.

(2) The tribunal when fixing charges in pursuance of the provisions of this section shall have regard to the means which in their opinion are best calculated to ensure the maximum development and extension in the public interest of the carriage by railway of merchandise and of passengers and their luggage, and shall accord ngly ascerta'n as far as may be practicable the effect which the existing charges, or any of them, have had upon the merchandise or passenger traffic to which they are applicable, and in particular whether the application of such charges has tended or, if continued, would be likely to tend towards causing the increase of diminution of the said traffic.

(3) If on any such re iew as is mentioned in the n xt following section it appears to the rates tribunal that the allowance made under paragraph (c) of subsection (1) of this section was too high or too low, the tribunal may revise the allowance and make such adjustment in the amount of the standard revenue as may be necessary.

(4) When fixing the charges necessary to produce the standard revenue, the tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges

for which are not subject to the jurisdiction of the tribunal, and if in the opinion of the tribunal the company is not making or has not taken reasonable steps to enable it to make adequate charges in respect of any such business the tribunal shall, in fixing the charges under this part of this act, take into account the revenue which would be produced by any such business if adequate charges were in operation.

59. (1) The rates tribunal shall review the standard charges and exceptional charges of each amalgamated company at the end of the first complete financial year after the appointed day, or if the appointed day is the first day of January in any year, at the end of that year, and, unless directions are given by the minister to the contrary in manner hereinafter appearing, at the end of each succeeding year, and the review shall be made on the experience of the operation of those charges for the period during which the standard charges have been in operation, or if that period is more than three years, then on the experience of the operation of those charges during the preceding three years.

(2) The minister may direct as respects any year after the second annual review that a review shall not be held, and the directions may extend either to all the amalgamated companies or to any one or more of those companies: *Provided*, That no such direction shall extend to any company which has applied to the minister for a review, or in respect of which the board of trade on the application of any representative body of traders have requested that a review shall be held.

(3) If on any such review the rates tribunal find that the net revenue or the average annual net revenue obtained, or which could, with efficient and economic management, have been obtained, by the company during the period on the experience of which the review is based is substantially in excess of the standard revenue of the company, with such allowance (if any) as appears to the tribunal necessary to remunerate adequately any additional capital which may have been raised or provided in respect of expenditure on capital account incurred since the date upon which the standard charges were fixed in the first instance, the tribunal shall, unless they are of opinion that owing to change in circumstances the excess is not likely to continue, modify all or any of the standard charges and make a corresponding general modification of the exceptional charges of the company so as to effect a reduction of the net revenue of the company in subsequent years to an extent equivalent to eighty per cent of such excess: *Provided*, That the tribunal in making such modifications as aforesaid as respects one amalgamated company shall, so far as practicable, avoid making such modifications as would be likely to affect prejudicially the financial position of any other railway company.

(4) If on any such review the rates tribunal find that the net revenue or the average annual net revenue obtained by the company during the period on the experience of which the review is based is less than the standard revenue of the company, with such allowance (if any) as appears to the tribunal necessary to remunerate adequately any additional capital which may have been raised or provided in respect of expenditure on capital account incurred since the date upon which the standard charges were fixed in the first instance, and that the deficiency is not due to lack of efficiency or economy in the management, the tribunal shall, unless in their opinion, owing to change of circumstances, the deficiency is not likely to continue, make such modifications in all or any of the standard charges and such a corresponding general modification of the exceptional charges of the company as they may think necessary to enable the company to earn the standard revenue with such allowance (if any) as aforesaid.

(5) Whenever on any such review such an excess as aforesaid is found, then, for the purposes of subsequent reviews, subsection (3) of this section shall have effect as if for the standard revenue there were substituted a sum (hereinafter referred to as the increased standard) equal to the standard revenue with the addition of twenty per cent of such excess, and whenever on any such subsequent review an excess is found above the increased standard, together with the allowance (if any) for additional capital, then, for the purpose of subsequent reviews, the increased standard shall be increased by a sum equal to twenty per cent of such excess, and so on: *Provided*, That if at any time after such an excess has been found the standard charges and exceptional charges are modified in pursuance of subsection (4) of this section on account of a deficiency, no such substitution shall be made until an excess

above the standard revenue together with the allowance (if any) for additional capital is again found.

(6) The rates tribunal, when modifying charges on any such review, shall have regard to the like considerations as when fixing charges in the first instance: *Provided*, That the tribunals shall have regard to the financial results obtained from the operation of any ancillary or subsidiary business carried on by the company, and if satisfied that the net revenue resulting therefrom is, having regard to all the circumstances, unduly low, may, for the purpose of such review, make such deductions from the charges which would otherwise have been fixed as they think proper.

(7) The modifications of standard charges and exceptional charges made in pursuance of this section shall take effect as from the first day of July, in the year following the last year under review or such other date as the rates tribunal may fix.

MODIFICATION OF TRANSPORTATION ACT.

TUESDAY, NOVEMBER 22, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m. in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The hearing will be resumed and Mr. Wood may proceed.

STATEMENT OF MR. FREDERICK H. WOOD, GENERAL ATTORNEY AND COMMERCE COUNSEL OF THE SOUTHERN PACIFIC RAILWAY CO., NEW YORK CITY—Resumed.

LOUISIANA PASSENGER CASE CONTINUED.

Mr. WOOD. At the conclusion of my statement on Tuesday last, which was interrupted for a few days, I was discussing the Louisiana passenger rate case, or, I should say, that part of the Louisiana case which related to passenger rates. I had undertaken to outline why it seemed to me that record demonstrated generally a State-wide discrimination against interstate passengers—because of the difference in the charge made to them per mile of transportation and the charge made to State passengers, without as far as I could see any justifiable cause, the only reason for the distinction being the mere fact that one man got on on one side of the State line and the other man got on the other side.

DISCRIMINATION AGAINST LOCALITIES, PERSONS, AND ROUTES.

That, however, was not all the evidence that was offered to the commission in the Louisiana case. We started with that as our foundation. Then we went all round the State and showed the existence of trading centers outside the State of Louisiana and completely surrounding the State of Louisiana which were in competition with trading centers within the State of Louisiana; that people in Louisiana resorted to those trading centers on the outside and to those trading centers on the inside for the making of purchases, for the sale of goods, and for the transaction of their ordinary commercial business; and that the people who lived in those localities on the outside and their representatives traveled into the State of Louisiana for the transaction of their business in competition with persons living in trading centers within Louisiana. And we showed generally the existence of that sort of competitive relations between outside localities and inside localities in connection with commerce generally in the State of Louisiana. And that showing, as I say, surrounded the entire State, and as we believed made a state-wide showing of that description, establishing as we thought a discrimination against localities outside of the State in favor of localities inside the State in connection with passenger travel into the State of Louisiana as related to passenger travel wholly within the State of Louisiana itself.

Then we showed as to certain points in Louisiana, both of which were located wholly within that State, that there were both State and interstate routes, the result of the advance in the interstate rate and the lack of advance in the State rate being that the interstate route, the interstate railroad, between those points was discriminated against and injured in the conduct of its business, and passengers who traveled upon that route were discriminated against in the charges that they paid in favor of that line of railroad between State

points that were located wholly within the State, and that the only way in which that situation could be corrected would be either by bringing the State fare up to the level of the interstate or bringing the interstate fare down to a level of the State. If the latter were done, it would result in direct interference with interstate commerce and nullification pro tanto of the opinion of the commission in Ex parte 74.

INTERSTATE RATES DESTROYED BY STATE ACTION.

Then we went all round the State and showed the existence not only of these trading centers of importance which I have described located outside the State but we showed the location of border points on each railroad at its entrance into the State of Louisiana. We did not make any effort to show that those border points were in direct competition with localities inside the State, but they were separated from points within the State only by an imaginary line; their geographical location and general characteristics were substantially the same as points on the other side of the border.

We showed as to those border points how a man who traveled from a border point outside the State to a point within the State paid 3.6 cents a mile, whereas a man who got on at the neighboring town paid 3 cents a mile. And with that showing we covered the entire State. We went all around it as to points of origin and into it and clear through it as to points of destination. Then we showed how a man by getting off at this first point within the State and repurchasing a State ticket would pay a lower charge to another point in the State or clear across the State than was paid by the interstate passenger from this border point who got on outside the State and stayed on all the way through. That evidence was supplemental to this evidence which I have before described, which we thought established directly and specifically a discrimination against trading communities shown to be in actual competition with each other.

And it was our view that by this supplemental evidence dealing with these border points we first showed this: That in so far as passenger rates are a matter of any consequence in the upbuilding of a community, either as regulating the expense which the persons who live in that community may have to pay or in their effect upon attraction of population by reason of the expense they must assume after they get there, that it was quite manifest that the sort of situation which I have described showed that that locality was at a disadvantage with localities similarly situated in the State of Louisiana in its struggle for population and in its efforts to build up such trade as it could; and, of course, trading centers are not limited to large trading centers; every point has more or less of it.

It was our view that that showed discrimination against that locality in that respect. Further, that it showed discrimination against those who lived in that place in connection with the travel which they undertook to do. And then, in addition to that, that it established discrimination, in another sense, against interstate commerce, against interstate passengers, as well as direct interference with interstate commerce growing out of this practice of rebuying tickets at the border.

I do not know, Mr. Chairman, that I can make my thought entirely plain as to that.

The CHAIRMAN. That is perfectly obvious. If you use discrimination in that sense it is manifest, and there is no necessity of proving it. All you have to do is to state the fact that the one paid more than the other for similar service or for substantially the same service.

Mr. WOOD. Yes; I understood that, but I was trying to get at that thought, in a little different way, on the effect of rebuying.

The CHAIRMAN. That was fully shown by Mr. Scandrett.

Mr. WOOD. It was?

The CHAIRMAN. You understood that to be so, did you not, Mr. Thom?

Mr. THOM. Yes.

RELATION OF DIFFERENT RATES PER MILE TO QUESTION OF DISCRIMINATION.

Mr. WOOD. All right. Of course I lay aside now in what I am going to say this evidence which dealt with specific localities in competition with each other. Even under the narrowest interpretation of the act, it seems to me, we made a complete case with that showing. But on this more general showing,

to which I have referred and with respect to the difference of the level of charge, I do not want the Senator to be under a misapprehension as to the basis of our contention in that respect.

It is not merely because there is a difference in charge for the service that we assert that an undue preference or an undue discrimination either against persons or against interstate commerce. It is a matter that involves more than that. I am speaking now solely of the passenger situation. I do not know of any case in which he claimed, with respect to freight rates, that the mere difference in charge per mile of freight service for State as compared with interstate business made out a case of discrimination against interstate commerce. Nor do I know of any case in which the Interstate Commerce Commission predicated its action on a mere difference in charge. It examined the attendant circumstances and conditions—all those matters which enter into the making of freight rates—and as the Senator from Iowa [Chairman Cummins] well knows there are many; there are so many economic considerations, and rates are sometimes made on a group basis, and sometimes made on some other basis, that I do not think anybody would have the temerity to say that because you could get up an exhibit and show mathematically that some State rate was higher per mile or per ton per mile than some interstate rate you had proven undue discrimination. You would have to go into the attendant circumstances and conditions, the circumstances and conditions that surrounded the problem.

But when you come to passenger rates my view about the matter is this: There again we must, as in all discrimination cases, consider the attendant circumstances and conditions. After all, it is the judgment of the man or commission as to what ought to be done under those attendant circumstances and conditions that determines whether there has or has not been undue discrimination. And when we come to passenger fares we find this, and we find it throughout the United States, that while there are different levels of passenger fares in different parts of the country, and probably ought to be, when we come into a single State or into a section of the country that is homogeneous we find that passenger fares are uniformly made at so much per mile for every mile traveled. There is no recognition in passenger fares as there is in freight rates, except under very unusual conditions of the diminishing return per unit of service for the longer haul as compared with the shorter haul. You find all over the United States and in any given territory and in any given State that the basis on which the carriers have elected to sell passenger transportation and on which commissions and legislatures, in so far as they have approached the problem, have undertaken to legislate is the basis of payment at so much per mile for every mile of passenger transportation sold. That is the attendant circumstance going not only into the history of the rate but the method of its application.

Now, gentlemen of the committee, our thought about the passenger-rate situation, aside from this evidence of which there was abundance as to discrimination against specific competing localities, persons, and so forth; our underlying thought, or at least mine, has been this: Bearing in mind the fact that that is the way in which passenger rates are made, to charge under that system of rate making a different rate to different persons traveling at the same time under the same circumstances in the same State, without some sound transportation reason, something that would appeal to a man's judgment as a justification for difference in treatment is a discrimination, first, against the person who paid the higher rate; second, against the locality from which he came; and, third, against the description of traffic of which his travel was a part, namely, interstate passenger traffic; and, fourth, against interstate commerce itself. And no reasonable man can say that there is a reasonable justification for that difference in charge if its justification is found simply and solely in the fact that he got on a train on one side of the State line and the other man got on on the other side; and yet under this record, as these cases were made, that is the only justification for that difference in charge.

Now, gentlemen of the committee, rightly or wrongly, we have thought that either under that old statute or under the new statute, under an interpretation of the act which would allow the Interstate Commerce Commission to correct real wrongs—and, of course, that is the purpose of the act—real wrongs against interstate traffic or interstate travelers, that that was a proper and sound construction of the discrimination section in so far as they related to passenger traffic. Not that we relied on that alone, because we did not; we had this other evidence of discrimination against specific localities to which I have referred.

NEVADA PASSENGER AND OTHER RATE CASES.

I am not going to take up the time of the committee in further discussion of the passenger cases. I assume that Mr. Scandrett did that with some degree of detail with respect to certain situations. I only want to say this, that some criticism was made by Chairman Shaughnessy, of the Nevada Commission. of the record in the Nevada case. The record in the Nevada case so far as it related to passenger transportation is precisely like the record in the Louisiana case which I have described. I briefed and argued both of them and they are exactly alike. We made the same general showing which I have undertaken to outline; the same showing of discrimination against interstate routes, the same border line showing, and we made the same showing as to the competitive relation of point in Nevada, such as Reno, Winnenucca, and the various trading centers there, with San Francisco, Sacramento, Los Angeles, and Salt Lake for the trade of the State of Nevada and the proportionate charges which they paid into the State of Nevada as compared with the State charges by reason of the 20 per cent advance which had been made in interstate fares and the failure to make a similar advance in the State fares.

Of course, we recognized, and the commission recognized that those points outside of the State being farther away must pay a higher fare. But taking into consideration again the basis on which those fares were constructed, we offered this evidence for the purpose of establishing undue discrimination against those localities, and that undue discrimination the commission found to exist. And I think what I have said about these passenger cases is fairly illustrative of the facts and of the theory upon which the passenger cases were presented to the Interstate Commerce Commission.

THE FREIGHT CASES.

Now, gentlemen of the committee, we come to deal with the freight cases, and there, again, I am not going to undertake to go into great detail. There has been a considerable amount of what seems to me to be unjustifiable criticism of the commission's conclusions and of the evidence upon which those conclusions were based; and reference has been made to a number of specific cases. If time permitted I would like to take up those cases and show what was before the commission, but I do not assume that this committee proposes or desires to sit as a reveiwing tribunal to go over that evidence. And I think I can illustrate the freight situation as I understand it, as it was developed in the cases in which our company was involved, and which is illustrative of other cases, by the Nevada situation, which is one of those in which the commission has been criticized.

The State of Nevada is located in the mountain-Pacific group, and where the percentage of advance was to be 25 per cent. The Nevada Railroad Commission declined to permit any advance whatever in any character of intrastate traffic. It did not base that declination upon the ground that there was not any relation between the State and interstate business. It did not base it upon any effort to pick out descriptions of traffic within the State of Nevada which it might think were not related to interstate commerce in such a way that State and interstate rates should go up and down together. It based its decision simply and solely upon its disagreement with the conclusion of the Interstate Commerce Commission in Ex parte 74 that a general advance in rates was required. There it stopped. The result was, then, that no freight rate in the State of Nevada was advanced in any respect whatsoever under the order of the Nevada commission—no rate could be advanced, I mean. We were confronted with a situation then that is obvious. First, whether this has any effect upon the question of discrimination, the power of Congress to set a standard for a general level of rates, and the power of the Interstate Commerce Commission to make that standard effective had been challenged in such a way that if every other State in the Union had done what Nevada did the result would have been disastrous.

We did not think that should go unchallenged, provided there was any way we could reach it. Furthermore, it must be manifest, whether the discrimination extended to every individual rate in the State of Nevada or not, that a 25 per cent advance on all interstate rates into the State of Nevada, and no advance whatever in State rates within the State of Nevada, must give rise to numberless discriminations against interstate commerce and interstate shippers even in the narrow sense in which competition or effect upon com-

petitive effort may be required as a matter of proof. So we approached the situation in this way: First, we took up the class rates and we found this condition of things in Nevada: The Interstate Commerce Commission—I think it was in 1910, but the year is immaterial—fixed class rates from California points into the State of Nevada, the California points being points that were largely in competition with the Nevada commercial centers. Very shortly after that the Nevada commission proceeded to establish its own class rates within the State of Nevada, and the record showed, by reference to opinions of the Nevada commission and statements of its members, etc., that those State rates in Nevada were made with an eye on the interstate rates that the Interstate Commerce Commission had fixed into Nevada, in order that the Nevada traders might have a set of rates that were fairly related to rates to San Francisco and Sacramento. Then we went on to show competition from other quarters of the State, besides, and rates that existed. To make this as brief as I can, the obvious effect of this nonaction upon the part of the State of Nevada had been to change the relation of rates there to the disadvantage of these competing trade centers. And we showed that and we made a State-wide showing on that point.

Of course, these outside centers, as to a considerable part of the State, at least, being farther away than centers inside must pay a higher rate. But it disturbed the relation which they had before and the relation which had really been a joint creation of the Interstate Commerce Commission and of the State commission itself. And it disturbed that relation to the disadvantage of these competing localities outside the State. And, as I say, we made a State-wide showing in that respect. Then we took up the principal commodities in Nevada and the commodity rates existing; Nevada not being a State with greatly diversified industries the number of commodities upon which there were specific commodity rates was comparatively few as compared with a number of other States. But we took those and showed a similar situation of competition in the sale of raw materials in Nevada for use by her citizens, such as grain to be used in the manufacture of flour, or live stock in the production of meat as compared with competition with outside mills and slaughter houses for those products moving outbound and inbound, etc.

Again, I must make my statement brief, because I must conclude this forenoon. But to give a single illustration, there is a lumber district that straddles the Nevada-California State line. A part of the mills are located on the Nevada side and a part of the mills are located on the California side, and for years they have gone into the State of Nevada on a group rate which has been uniform, taking all these mills together. It has been a situation the propriety of which has been recognized by both the Interstate Commerce Commission and the Nevada commission.

Now, the effect of nonaction upon the part of the State of Nevada was simply to destroy that parity of rates and that equality of opportunity which the mills on the two sides of the line had enjoyed, with the result that those mills which happened to be located on the Nevada side of the line secured an advantage ranging from $1.25 to several dollars per thousand feet in the delivered price of timber cut from exactly the same forest and timber district and going into the State of Nevada.

The CHAIRMAN. As to lumber going into the State of Nevada?

Mr. WOOD. Yes; for lumber delivered into the State of Nevada. The man who cut it on the Nevada side of the line had an advantage from $1.25 to several dollars per thousand feet in delivering that lumber within the State.

Now, gentlemen of the committee, in brief, we used other illustrations and undertook to cover the class and commodity situation as I have described. Of course, we did not make that kind of showing with respect to every individual rate in the State of Nevada, nor between every two points within the State of Nevada; and if that kind of proof were required we would not be able to meet a situation of that kind. But as I said on the first day of my appearance that sort of proof is more than the Interstate Commerce Commission requires itself in determining this matter as between rates which are wholly interstate. We tried out a case in the only way it could be tried, and our witnesses said, what I believe to be a fact, that the situation which they disclosed was representative and typical of our situation. And we did not make just that bold assertion by putting in a little dab of evidence and then handing it to the commission and saying this is representative.

As I say, we went around and undertook to make it really representative of all the class rate and commodity rate traffic. There was no denial of that

statement or as to its representative character. There was issue joined as to some commodities to which our exhibits and to which our testimony related, issue joined as to whether the relation of rates which we showed existed did in fact discriminate against interstate commerce. But there was no denial that what we had showed by this elaborate process to be representative was not in fact representative. The commission accepted it as such. I do not see how they could have done otherwise. Then they proceeded, however, to consider as to those specific commodities and specific rates on which issue had been joined, as to whether we were right or whether the shipping interests of Nevada or the Nevada Railroad Commission was right. And they held that we were right with the exception of rates on ore; and that, so far as the State traffic is concerned, is the most important commodity involved in the Nevada State rate case. They held that we were right except as to ore, and on ore that we were wrong; that the relation of ore rates which had resulted from the nonaction of the Nevada commission did not result in undue discrimination against interstate commerce, the Interstate Commerce Commission said, and so they excepted ore from their order.

Now, gentlemen of the committee, as to this subject I have had to make a very brief and very running review, and it contains a good many conclusions on my part when I would prefer to give you evidence of the facts, but, of course, that is not possible, and your committee can not sit here as a reviewing tribunal and examine all this evidence. But that was the character of the evidence and the showing which we undertook to make. And I think that is typical of other freight rate cases.

Senator SMITH. May I ask you to just state in a sentence on what ground the commission held that you were wrong in reference to the ore rate in Nevada.

Mr. WOOD. Senator, they examined the resulting relation between the State and the interstate rates. There were certain complications in connection with the interstate rates; some had been advanced one way and some not advanced, and they were unable to find that there was undue discrimination against interstate commerce. I will not say they found there was not, but I should say they said we did not prove it—that it was failure of proof on our part.

The CHAIRMAN. Keep in mind, Mr. Wood, this one thing: The committee when it framed the transportaiton act tried to do a certain thing, and I do not believe that any member of the committee, at least as far as I know, has any disposition to change the rule as we thought we were establishing it. It is alleged that the Interstate Commerce Commission has misinterpreted that rule to such a degree and extent that it becomes our duty to restate the rule so that it can not be misinterpreted. So far as this particular question is concerned that is all there is in this hearing. I do not think the question is whether we should recall what we were trying to do then but whether there has been such misunderstanding of our rule that it needs clarifying. We did not intend to reverse or modify the doctrine of the Supreme Court in the Shreveport case or the Illinois case or the Minnesota case, and I do not think there is any disposition in the part of the committee to do that. When you speak of a sawmill on the California side of the California-Nevada line competing with a sawmill on the Nevada side in the same market in the same grade of lumber with a different rate from the California mill to the rate from the Nevada mill to the market, so that the California mill is unduly and unreasonably prejudiced in the disposition of its product, we all understand that that is discrimination. I do not think anybody would claim that it was not. I think you can take that part of it for granted now. It is simply a quesion of whether we have so bunglingly stated the rule that we had in mind that it becomes necessary to clarify or modify the language of the law so that it will at least be less susceptible of misinterpretation.

Mr. WOOD. I instanced that because of this, Senator, that in answer to a question which had at least been impliedly conveyed by some statement made to the committee, it was indicated that there was nothing before the Interstate Commerce Commission in those cases except the effect upon the revenues of the carriers and the different charge per mile for the service.

The CHAIRMAN. We are going to examine the rulings of the Interstate Commerce Commission and ascertain whether there has been the misconstruction of which I have spoken. I think no member of the committee will decide the matter until he has become familiar, first, with what the Interstate Commerce Commission has done so far as the rule is concerned in its application of it.

We are not going to review the orders of the Interstate Commerce Commission, however. Second, we are going to look to the claims made by the railrad companies with regard to a proper interpretation of the statute. And they will be ascertained by the petitions which were filed by the railroad companies before the Interstate Commerce Commission, by the decisions of the courts which have already passed on the question, and from these sources we will be able to find out whether our rule has been misunderstood or misapplied.

Mr. WOOD. I stated in the beginning, on the first day I was here, that what the commission had before it in these cases was the revenue effect, consideration of the circumstances under which these advances were made or were not made as a part of the attendant circumstances, and these illustrative cases of the actual effect. I made this review simply to point out more specifically that situation.

REVENUE THEORY INCLUDES DISCRIMINATION AGAINST PERSONS AND LOCALITIES.

Now, Mr. Chairman, with respect to the interpretation of the law, I think it is perfectly clear as you have suggested that in this lumber case nobody would deny it was discrimination. It is our position, however, that any interpretation of the statute which requires a meticulous showing of competition as between individuals and localities is too narrow a construction of the statute, either under the law as it exists to-day or as it existed prior to this present amendment. In the first place, dealing with the situation in its relation to individuals, there is no reason why as to this State business and these State rates the Interstate Commerce Commission should not pursue the same rule that it pursues in connection with the determination of interstate rates. And they have said that it is not necessary to present actual competition between two localities in order to establish undue discriminaion as between rates both of which or all of which are purely interstate; that those localities are entitled to the opportunity to grow, to attract industries, to increase their population, and to increase their business to the extent that they may do so on an equitable relation of rates as compared to other communities; that no two communities have precisely the same advantages, and they are located differently with respect to different parts of the country, and to that extent they must absorb the difference, but that the railroad companies—and I am dealing now with interstate rates, where we are primarily responsible—that the railroad companies have no right to accentuate those disadvantages by maintenance of a basis of rates that are inequitable as between one place and another place, and thereby deprive the first community of an opportunity it should enjoy.

Now, we think that rule should be read into the jurisdiction of the Interstate Commerce Commission in the case of undue discrimination in favor of State rates, and when you do that it is essential and proper that the Interstate Commerce Commission should take a very broad view of the effect of rates, State and interstate, upon people inside a State and people outside a State and upon communities inside a State and upon communities outside a State. Furthermore, my conception of the so-called revenue theory interpretation of this statute is that it is not a theory that looks solely to the revenues of the carriers. It looks to the effect upon individuals and communities. It looks to an equitable adjustment of rates as well as to sufficiency of revenues for the carriers themselves, particularly as applied to the conditions we had in 1920. And those conditions were these: A general advance in all rates was necessary.

The prewar level was too low for the railroads if the transportation facilities were to be preserved. Rates had to come up, and they could only be brought up by the contribution of the patrons of the railroads—and those railroads were maintained for the common use of all those patrons, State and interstate.

Furthermore, we said this is a time when nice consideration of individual rates is out of place: the circumstances and conditions demand an advance in all rates for the good of all, and those circumstances and conditions apply to all traffic. State and interstate; and while it is not conclusive of discrimination against an interstate person who ships or travels, or an interstate locality, or against interstate commerce not to put the State rates up in the same proportion, yet it is prima facie discrimination because the result is then that there has been undue preference accorded to this man whose rate has not been put up, in that he has been relieved of making any contributions to that which Congress has said is necessary for the preservation of these transportation instrumentalities for the common good of all; that he has therefore received preferential treatment. That preferential treatment may be preferential treat-

ment in an individual case which is susceptible of reasonable justification, and if so, then no wrong has been committed against interstate commerce. But it is not a reasonable justification for that preference which has been accorded to him and that disadvantage which has been extended to his interstate neighbor to rely solely upon the fact that one man is dealing wholly with State traffic and another with interstate, because that is a purely artificial basis of differentiation.

I do not want the chairman or the members of the committee to think for a minute that in bringing before the committee these cases of discrimination against individual persons and individual localities in their competitive aspect that I am saying this law should receive such a narrow construction as that, or that the carriers have contended for it. We have contended for a broad construction, a construction which would enable the Interstate Commerce Commission to reach these wrongs and correct them and correct them in a practical way. I have brought these other matters to the attention of the committee, however, because I believe that even though our contentions as to a broad construction of the statute are wrong, that the orders of the Interstate Commerce Commission in these cases may be sustained upon the basis of the narrower construction.

PROPOSED AMENDMENTS WOULD NULLIFY PRIMARY PURPOSE OF CONGRESS TO PROTECT REVENUE.

Now, gentlemen of the committee, the Congress, it seems to me, when it comes to a consideration of this matter as a matter of public policy, must, as I said in the beginning, be profoundly concerned with the revenue side of this situation, whether it thinks revenue has any place in a discrimination case or not. It was profoundly concerned with the necessity for adequate revenue and provided for it in the transportation act. Now, the effect of the proposed amendments to the interstate commerce act as related to the control of State rates, as I see it, puts it in the power of the States if those amendments are enacted absolutely to nullify the revenue requirements of the statute if they see fit to do so. And it is not any answer to say that 36 of them did all they could in that direction. Even of those 36 a part were unable to act because of statutory passenger fares.

We are dealing now with the question of power, and if one State could set up its judgment as to the revenue requirements of this situation, as Nevada and Arizona and North Dakota did, the entire 48 States could have done so; and if we are going to have an orderly regulation of interstate commerce which produces, first, an adequacy of revenue in the aggregate, and provides, second, for the equitable distribution of the rates out of which that revenue grows for all classes of traffic, the Interstate Commerce Commission must have broad powers to correct any wrong that it finds in the situation. And that does not involve any loss of dignity to the State, and it does not bring about any such frozen set of State rates as has been suggested to the committee.

STATE DIGNITY NOT IMPAIRED—ACTION OF CALIFORNIA.

Gentlemen of the committee, I want to contrast the action of two commissions, the commission of California and the commission of Nevada. I would like to have the opinion of the California commission made a part of the record. It is the best statement of this situation I have seen. It is the most statesmanlike. It comes from a State commission. It contains its expression of view as to the duty of State commissions in 1920, and of the disaster which would have resulted to the country if they had not done as the California commission did. And it points out in stronger language than I can what seemed to me to be the practical requirements of the situation so far as the law is concerned.

But the California commission says in that opinion that in accepting the conclusions of the Interstate Commerce Commission as to the necessity for this general advance in rates, as to which it says there can be but one conclusion to be followed—for to follow 48 conclusions would be manifestly impossible—the California commission says, although we accept that because we think that is what the national exigency requires, we have not abdicated our rate-making functions; we are simply recognizing what everybody ought to know, that this prewar level of rates must go and it must be superseded by a general advance, and it must be done quickly if the financial integrity of these carriers is to be preserved.

STATE RATES NOT "FROZEN."

And so they followed suit, but thereby they reserved to themselves complete jurisdiction to readjust all rates within their own borders, dealing with individual rates, adjusting them to the necessities of the individual situations in that State, correcting discriminations between State rates, etc. And they are functioning to-day just as effectively and just as fully as they ever did. There are no frozen State rates there.

Mr. Jackson, of the Wisconsin commission, who, I think, was the first man to use the expression "frozen rates" in the appearances before the committee here, represents a State that granted all advances in State rates which were requested as to freight rates, and denied advances in passenger fares only because they did not have any statutory authority to grant them. And Mr. Jackson, so far as freight rates are concerned, said to this committee:

"Our rates are not frozen. We are acting very well. We are doing business just as we did before, but I sympathize with our friends across the line in Illinois, who are not."

So there has been no freezing of these State rates. There has been no reduction of the legitimate jurisdiction of State commissions by reason of the passage of this law or by reason of its administration by the Interstate Commerce Commission. Rates are frozen only in those States which, like Nevada, refused to recognize the national exigency; only in those States which, if followed by all other States, would have made impossible the realization of the prime purpose of all regulation, and that is, adequacy of revenue and its equitable distribution among the several classes of traffic.

And there is no amendment to this law needed to thaw out the rates that are now described as frozen. Those rates are frozen to the extent that they are frozen, if that is a proper expression, because those States have seen fit to maintain a set of rates that, in the judgment of the Interstate Commerce Commission, has resulted in undue discrimination against interstate comment. That being so the Interstate Commerce Commission, of course, directed its removal. But those very same States by a belated recognition of the national exigency of the necessity for an advance in the general level of their rates up to the level which prevailed elsewhere——

Mr. THOM (interposing). Even now.

Mr. WOOD (continuing). Yes; even now. By that action, by their voluntary action, they would remove that undue discrimination against interstate commerce which has hitherto required an order of the Interstate Commerce Commission to remove. And upon that sort of showing I have no doubt but that the Interstate Commerce Commission would revoke the outstanding order.

The CHAIRMAN. I will ask Senator Smith to take the chair, as I must now go to the Senate Chamber to open the Senate. The Senate meets at 11 o'clock this morning.

Senator SMITH (presiding). You may continue your statement, Mr. Wood.

Mr. WOOD. In fact, one State did do so in a case of this character, which arose quite independently of this general advanced rate case, an ordinary Shreveport proceeding, antedating the passage of the transportation act, namely, the Natchez case, involving the rates in Louisiana. The Louisiana commission, after that order had been in effect for some time, entered an order voluntarily establishing in the State of Louisiana those rates which the Interstate Commerce Commision had said must be established in order to remove discrimination against interstate commerce. They went to the Interstate Commerce Commission and said This is what we have done, and we would like to have the order revoked, and the Interstate Commerce Commission revoked it.

STATES FROZEN ONLY WHERE STATE INSISTS UPON RIGHT TO DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Now, gentlemen of the committee, there is not any reason why that course could not be pursued by any one of these States at this time who complain that their rates have been frozen. The freezing is not due to the law. It is due to the insistence of that State commission upon its own violation of the law. It is due to the insistence of that State commission to maintain rates which result in undue discrimination against interstate commerce.

All that State commission has to do is to purge itself by its own voluntary action of that violation of the Federal act, and then it will have its jurisdiction restored over all those rates. And the restoration of jurisdiction in those

cases that resulted from the advanced rate cases would not be an empty thing, because in both the State and interstate cases no effort was made, as I have said, to deal with individual rates or individual relationships. It was the general situation with which the country was confronted. And those States that recognized that exigency and put the general level of their rates up have found a wide field for their activities in the consideration of individual rates within their borders. And so would those other States if they would take the course which I have indicated. And no amendment of this law is required in order to restore to those State commissions anything that they have lost by the orders of the Interstate Commerce Commission except this one thing—the power to discriminate against interstate commerce. They can get every other power back by the progress which I have described, and those State commissions which recognized the national exigency have every power but that to-day. The only power of which these State commissions have been ousted by this law or by the administration of the Interstate Commerce Commission is the power to unjustly discriminate against interstate commerce.

Senator STANLEY. You spoke of that being a violation of the Federal act. Do you refer to the act of 1920?

Mr. WOOD. I refer either to the transportation act of 1920 or the interstate commerce act of 1887. Both prohibited undue discrimination against persons, localities, and descriptions of traffic.

OPINION OF CALIFORNIA COMMISSION—A CORRECT ANALYSIS OF FUNCTION OF STATE COMMISSIONS.

Furthermore, I do not see that the dignity of the States or of State commissions has been injured. I do not think the California commission lost in dignity by the action it took. In fact, I think it gained in dignity, and it preserved its own jurisdiction. I want to read just a few words from that decision, because I think so far as the question of State dignity and State rights and State duties and State power are concerned it states them better than anything I could say.

Senator POINDEXTER. Which one of the commissioners wrote that opinion?

Mr. WOOD. It does not state, Senator. The names of all commissioners are signed, but it is by the commission.

Senator POINDEXTER. Probably it was written by one of the clerks.

Mr. THOM. He must have been a dandy, then.

Mr. WOOD. Yes; he was a pretty good one if he wrote it. They go ahead and refer to the situation with which the country was confronted, but that I will not read. They describe the delay which would be incident to a meticulous consideration of each and every rate in the State of California, and then they say this:

"This, however, is not the most serious result of independent action by this State. If this commission, under the circumstances that now confront us, fixes State rates regardless of the order of the Interstate Commerce Commission, and if such rate fixing resulted in a return to the railroads of the Mountain Pacific group less than 6 per cent authorized by the Interstate Commerce Commission, either the Interstate Commerce Commission must further burden interstate commerce with rates high enough to make up the deficit resulting from the California action or, if legally possible, the Interstate Commerce Commission would be compelled to overrule this commission, or the Esch-Cummins Act would be a demonstrated failure."

Then, after a description of the revenue requirements as contained in the law, the California commission continues:

"There can be no doubt that in order to prevent the annihilation of some of the less profitable roads it was the purpose of Congress to authorize rates which because of the necessity of maintaining a parity for all roads in a given competitive territory would return the more profitable roads an unreasonable earning, and faced with the alternative of providing rates which would only make a reasonable earning for the profitable roads and which would destroy the others, Congress determined that rates would be so adjusted as to permit the weaker roads to exist and to continue to function, but at the same time deprive the more profitable roads of the result of overplus of earnings.

"It is obvious that this plan can not work if each State or a given group insists upon a determination of its own as to what contribution should be made to the common group income."

And then after saying that the Interstate Commerce Commission is a national body it continues——

Senator FRELINGHUYSEN (interposing). Mr. Chairman, I suggest that we suspend, inasmuch as the Senate is in session, to answer to the roll call.

Senator SMITH (presiding). If that is agreeable to the committee we will suspend for a brief time.

(And thereupon the members of the committee went to the Senate, and upon returning to the committee room the hearing was resumed, as follows:)

Senator SMITH (presiding). The committee will come to order. You may proceed, Mr. Wood.

Mr. WOOD. Then after pointing out that the Interstate Commerce Commission is a national body entitled to the confidence of the country, and that it must be trusted to determine the extent of the advances which were required in the interest in the maintenance of adequate transportation facilities, the California commission continues:

"It is our deliberate judgment that it is the duty of this commission to cooperate in every reasonable way to give the Esch-Cummins Act a fair trial and, rather than to attempt to impair the success of this legislation, to so act as to make it successful, not merely on the general proposition that all laws should have a fair test but on the more definite situation that now confronts this country. We must all realize that the transportation companies have resumed control of the various railroad properties under difficult circumstances, and in view of the vital needs of this country for adequate transportation it is the duty of all citizens and officials to further any movement looking to the bettering of the transportation business.

"We feel that regardless of any opinion we might have as to the wisdom or unwisdom of the Esch-Cummins Act, it is the foundation upon which the regulation of the railroads now rests, and to shake that foundation would be against the public interest.

"We do not mean to say that this commission has abdicated its functions in rate fixing, as we believe that our determination to grant the prayer of applicants is sustainable upon the ground of reasonableness."

And then goes on some reference to the order of the California commission, which was similar to the order of the Interstate Commerce Commission, reserving for future consideration the matter of individual rates and individual relationships.

I have never thought that the California commission lost any dignity by adopting the position that it did or by using the language that it did. I have never thought that there had been any invasion of its rights as a State regulating body or that it had in any way abdicated its functions. On the contrary, it had added to its dignity, because it recognized that there was a divided responsibility for making a success, not merely of the Esch-Cummins Act as a piece of legislation, but for establishing conclusively the competency of regulatory bodies to regulate the railroads in times of great emergency, so that the railroads would be in a position to secure adequate revenue and to see that equal justice was done to all classes of persons and to all users of the railroads in the distribution of the necessary charges.

And the California commission proceeded here exactly as the Interstate Commerce Commission did. It regarded the exigency of the situation as being one that required uniform treatment in the raising of rates, and then reserved to itself the regulation of individual rates later on. That is exactly what the Interstate Commerce Commission did. The rates in California are no more frozen than are the interstate rates.

The California commission said this prewar level of rates must go, and this higher level of rates must be substituted therefor, as directed in Ex parte 74. It said that the rates are such that it requires a general raising of the level of rates to meet the exigencies of the situation, and therefore we are going to meet that situation. We are not abdicating our rate-making functions. We are not saying that these rates must remain forever in effect. We are going to treat these rates and view them as a whole and put them up to where everybody says they must go, and then we will treat them as they come up in individual cases; we will treat them as individual rates.

So that the California rates are not frozen and the interstate rates are not frozen. And in every State that acted as California did the situation exists, just as it exists in California.

SITUATION INTOLERABLE WITHOUT ACTION BY INTERSTATE COMMERCE COMMISSION.

Now, it would have been an intolerable situation unless all of the States had done what the California commission did, or unless, in the absence of action on their part, the power exercised by the Interstate Commerce Commission had been exercised, and the State rates had been brought up into harmony with the general program of advances.

And, certainly, as a matter of public policy, the Congress, sensible as it was of the necessity for increased revenue and increased rates, could not leave that matter to the judgment of 48 independent tribunals. It was essential, that while they should have their jurisdiction reserved to them on local matters; while they should have an opportunity to function, that if they failed to recognize the necessities of the situation—it was essential that the Federal power should be exercised in order to bring their rates into harmony with the general program of advances. An intolerable situation would have resulted otherwise for three reasons: The immediate effect would have been the failure of the carriers to receive the increased revenues which the situation demanded. I pointed out here the other day at the termination of Federal control, and when this case before the Interstate Commerce Commission was on trial, the carriers were earning at a rate which, if continued throughout the year on the same level, would have yielded a net operating railway income of about $200,000,000, or something like $200,000,000 less than their interest charges.

Immediately came the order of the Railway Labor Board, imposing an additional burden of something like $600,000,000 per year upon the railroads. Without an immediate advance in rates, therefore, the railroads would not have been able to pay the increased labor charges and to pay the interest charges on borrowed funds—they would not only not have been able to do that but they would have actually had a deficit of $400,000,000 per year.

Now, that is the situation that confronted the country so far as the transportation industry is concerned. That would have been an intolerable situation. If adequate transportation is to be maintained; if the public is to have adequate transportation facilities—if all classes of shippers are to be accorded equal treatment—it was necessary to have uniform and concerted action, and not leave to 48 different States, if they had seen fit to have acted that way, the adjustment of these rates, thus preventing the railroads not only from paying their running expenses but from paying their interest on their bonds and their taxes.

It was not a question of what was a reasonable return; it was a question of paying the interest on their bonds and of paying their operating expenses as they accrued. To have permitted the States to have made whatever rates they saw fit would have been intolerable.

Further, as the California commission points out, to have acted otherwise than it did in the face of the lack of revenue, and in the face of the increased revenues required, would have made it necessary to increase the rates on interstate commerce, because whatever lack of revenue there was to the carriers through nonaction by the States would have had to have been made up by an increase on the rates imposed on interstate commerce itself unless there was a power lodged in the Interstate Commerce Commission to see that the State traffic bore its proper proportion of these increased revenues. The imposition of this additional burden on interstate commerce would have been intolerable, when we consider interstate commerce as a whole.

Furthermore, it would have been intolerable, and would have presented an intolerable situation with respect to the effect upon individual persons using the railroads, either as shippers or as passengers, to have imposed upon individual users of these interstate highways, as they are, an entirely disproportionate part of the increased charges necessary to meet the situation as it was disclosed at that time.

I can not conceive of a greater defect in the law than that which would have arisen from failing to give to the Interstate Commerce Commission the broad power to remove discriminations against interstate commerce and to remove them in a practical way. And that is all that the Interstate Commerce Commission has done in this case.

Now, their judgment as to determining whether or not undue discrimination has resulted may be open to criticism. But it presents an issue which, if decided in favor of the carriers, manifestly requires correction on somebody's part. That issue has got to be left to somebody. It can not be left to each State to determine for itself whether its actions have resulted in undue dis-

crimination against interstate commerce. That must be left to the Interstate Commerce Commission. Subject to review of the Supreme Court of the United States as to the sufficiency of the evidence, that body must be left to judge.

Now, I have said that the situation would have been intolerable if the Interstate Commerce Commission had not been in a position to exercise the power that it did exercise, and I think that is demonstrated by the situation as it existed at that time.

EFFECT ON ECONOMIC READJUSTMENT AND ON RAILROAD SOLVENCY IF INTERSTATE COMMERCE COMMISSION ORDERS MADE INOPERATIVE.

I want, for a moment, to call the attention of the committee to what the situation would be now if Congress, by an amendment to this act should remove from the Interstate Commerce Commission the power that it did exercise, and by that removal should either directly or indirectly, by legislative enactment, strike off those orders which the Interstate Commerce Commission has made in these cases. The problem of 1920 was essentially a revenue problem. It was a problem to be met by a general advance in rates. The problem of the present day is not a revenue problem. The railroads to-day are not earning a fair return upon the value of their properties; they are earning scarcely half of that amount which, in the wisdom of Congress, was set as the standard for their earning capacity. So we are not concerned now with any necessity for a reduction in freight rates or passenger fares for the purpose of taking away from the railroad companies exorbitant earnings.

The problem of the present day is how to preserve the financial integrity of the railroads; the problem of to-day is how, preserving the financial integrity of the railroads, rate reductions may be made in aid of the economic readjustment that is now in progress in this country. The limit to which the railroads can further contribute to that economic readjustment is very small. Any contribution that they make means that they must do it at the sacrifice of revenue which they themselves need. In point of fact, the railroad companies, as a whole, already have contributed in very large measure to the economic readjustment by a reduction of rates in very substantial amounts, notwithstanding the fact that this, together with all other classes of property holders have suffered—a suffering which is reflected in the inadequate earnings of the present. But, nevertheless, it is recognized that to the extent of their ability they should aid in the process of economic readjustment to the extent that they may, in the readjustment of freight rates and passenger fares which they can effect by a saving by lowering expenses to be reflected in the readjustment of these rates. But with the wage bill of the carriers of 1920 substantially the equivalent to the gross earnings of the prewar period of 1916 and 1917, nothing like a substantial reduction in all rates can be thought of, at least as an immediate step.

It is perfectly evident that to the extent that wages may be reduced and operating expenses may come down the amounts of those savings are not going to be sufficient so that if translated into anything like properly reduced rates it is going to do anybody any good. And to the extent that those operating expenses can be reflected in reduced rates it seems to me that the reduction ought to be put upon those commodities and upon those descriptions of traffic where such reductions will do the most good in economic readjustment. In other words, while the problem of 1920 was a revenue problem, the problem of to-day is an economic one. And it is a question how far the carriers can go in reductions in aid of the economic readjustment, but manifestly those reductions ought to be placed, as it is an economic problem, where they will be of the greatest economic benefit.

REVIVAL OF STATE PASSENGER FARES WOULD PREVENT FREIGHT-RATE REDUCTIONS IN AID OF INDUSTRY.

Now, the first effect which the amendment of this law, as proposed, which would make invalid the orders that the Interstate Commerce Commission has made, would be to restore over a very large part of the country the greatly reduced level of passenger rates. It would, in some 20 States, reduce those passenger fares to the level of about 3 cents per mile.

Senator STANLEY. What is the passenger fare now?

Mr. WOOD. Three and six tenths cents per mile.

Now, as applied to the passenger traffic, that would be a large amount of reduction. But of these 20 States there are 15 that have statutory passenger fares. And the majority of those are on the two-cent basis. And that is particularly true in the eastern territory. And the courts have divided upon the question as to whether or not, in the absence of the power of the Interstate Commerce Commission to remove discrimination against interstate commerce, those prewar passenger fares will be revived: One circuit court of appeals held one way and another circuit court of appeals held the other way.

Senator STANLEY. Did the Interstate Commerce Commission fix a uniform passenger rate for the whole country?

Mr. WOOD. No, sir; they took the passenger rates as they existed, which was pretty generally 3 cents per mile, and decided that they should go up 20 per cent, which made them 3.6 cents per mile. In the arid regions in the West they were already 4 cents. Those were also advanced 20 per cent, but aside from that they became 3.6 cents per mile all over the country.

Now, as I say, the United States circuit courts of appeals have divided on the question whether those statutory fares would be revived or not. So that the first effect of any legislation would be that it would have the direct or indirect effect of striking off the orders of the Interstate Commerce Commission, and that would have the direct or indirect effect of putting all these passenger fares in jeopardy and stake the revenues of the carriers from passenger fares wholly on a decision, ultimately, of the Supreme Court on a doubtful question of law. That certainly would not be a situation to which the carriers should be subjected or which they should be compelled to confront. And if the 2-cent passenger fares or the 3-cent passenger fares should become revived at once——

Senator STANLEY (interposing). Just there, let me ask you a question. The adjustment of the passenger rate for intrastate business might affect the revenues of the Government, but just how you get it to be discriminatory against interstate commerce on the mileage basis, I do not see. It is one rate fixed through; it is a symmetry of rates. I can see how communities could suffer by having a State fix a certain charge for freight where it is within the State and for a similar haul at another rate where it is without the State, and discriminate between two shippers or two roads, but just how the fixing of passenger rates could act as a discrimination against the findings of the Interstate Commerce Commission I do not see.

Mr. WOOD. I went into that matter at some length earlier in my testimony, Senator. Briefly, our contention about that was, first, that the State and interstate passengers were traveling together on the same train; they were using the same facilities; they were being sold the same identical article at the same time under the same circumstances and conditions, and the one was being charged 20 per cent more than the other. Now, that was a wrongful discrimination against that interstate passenger affecting his pocketbook. It is just the same as it would be if the local gas company here should charge you 80 cents per thousand feet for gas and charge your neighbor $1 per thousand feet.

Senator STANLEY. But that would not give the Federal Government any control over it if it were wrong. That is the trouble in this Congress down here right now. It is in the heads of a good many of my colleagues—and they may be right—that anything that is wrong can be righted by this Federal Government. Now, as I understand it—and I am trying to get at the jurisdiction——

Mr. WOOD (interposing). Yes.

Senator STANLEY. I do not see that the Interstate Commerce Commission under the interstate commerce clause of the Constitution has a right to go out and remedy anything that it thinks is morally wrong or industrially unfair or academically unjust unless it directly affects the commerce between the States. And then Congress has no power to interfere, as I see it, and you must show some connection between interstate and the intrastate rates before you get jurisdiction. That is what I am driving at.

Mr. WOOD. Well, that is what this does. There is a relation between the State and the interstate rate, and there is a relation there between the State passenger fare and the interstate passenger fare, and it has an effect upon interstate commerce.

Now, under the commerce clause, in the enactment of the interstate commerce act, even before the transportation act was passed, discrimination against persons was forbidden. That is, there must be no discrimination against an interstate passenger.

Now, we say when he is charged a higher price for his railroad fare than the State passenger is charged, and the only reason that is assigned for it is

that the one is a State passenger and the other an interstate passenger, he has been discriminated against, simply because he is an interstate passenger, and solely in that capacity. He is not charged a different rate for a different service. No; it is exactly the same service, but one is charged 20 per cent more than the other. Each one buys identically the same service, a mile of transportation, on the same train, riding, perhaps, in the same car, and it may be on the same seat, but one man pays 20 per cent more for his transportation than the other, and we say that is a discrimination. That is a difference in treatment, and that is the dictionary definition of "discrimination." And we think it is undue discrimination, because there isn't any difference in the service; if it were true that there was a difference in the service it might be all right, but the service is exactly the same.

Senator STANLEY. My idea is this: That where you are transporting freight in interstate commerce and the State comes to the State line here and raises or lowers the rate, or the cost of service for a certain distance, the same distance and the same tonnage is hauled over another portion of that line and which crosses a State line, then you have got a difference in cost of transportation and the cost of freight to different shippers affecting the industrial development of different communities and affecting the symmetry of this vast plan of rate adjustment. Now, when it comes to hauling individuals at a certain price, there is no intimate relation between the man who is traveling across a State line and the man who is traveling within a State line, and I am inclined to doubt whether it is any business of the Interstate Commerce Commission to interfere with purely intrastate passenger rates for the purpose of preventing an inequality of charge between two persons traveling on the same train.

Mr. WOOD. We think there is that same symmetry. And we think the situation affects the lack of opportunity of those individuals in a similar way. We think there is that same lack of symmetry in those rates as there is in the freight rates. And it affects localities and persons. It affects their opportunity to do business in different localities. It affects the opportunities of the people to travel between the States and to do business there. And it affects the power of the Interstate Commerce Commission over interstate commerce, and absolutely destroys the power of the Federal Government over interstate affairs.

I offered the other day a little map which shows what the passenger situation would have been in the event the Interstate Commerce Commission had not had the power to deal with this passenger situation. I call your attention to this map now, and the States in pink are the States that had the statutory-passenger fares; and the States in blue are the States that declined to make an advance in passenger fares, although there were no statutes preventing it; and the States in white are the States that conformed their fares to the interstate rates as fixed by the Interstate Commerce Commission.

Now, you will see what a crazy quilt of fares that would have been. And you will see how difficult it would have been to have maintained any rate at the level which the Interstate Commerce Commission found was necessary in order to produce the return fixed in the transportation act, on account of the fact, which the testimony in this case showed, of the custom to constantly get off at the State lines and rebuy tickets. That was the testimony, and that was the experience of the carriers where that situation existed. So, as I say, that was the experience with those fares, and the experience has shown, where you have a situation like that, that those State fares actually control and dominate the interstate fares, and unless the Interstate Commerce Commission has authority and power to correct that sort of a situation, the Interstate Commerce Commission is, as a practical matter, ousted completely of its jurisdiction over passenger fares, and the States make all the interstate-passenger fares.

Now, with that situation——

Senator STANLEY (interposing). It is not ousted of jurisdiction to make them; it is simply deprived of its opportunity to enforce them in certain localities.

Mr. WOOD. I say, so far as the practical matter goes, the enforcement of them and the making of them rests with the States.

Now, we think that is not only an interference with interstate commerce, but where such fare is less than an interstate-passenger fare, it is a discrimination against interstate commerce as between person which was not allowed under the old law, and which the old law prohibited, and under the new act,

it permits the State to nullify completely the authority given in the transportation act. We may be wrong about that, and if we are, the Supreme Court will correct us. But if we are right, it seems to me, as a matter of policy, it should be corrected by the exercise of Federal power over it.

REVENUES WOULD BE PUT BACK WHERE THEY WERE AT END OF FEDERAL CONTROL.

And to get back now to the effect that the striking off of these orders would have on the present economic situation. I have already pointed out that while in 1920 the problem was to raise sufficient revenue to support the railroads, at the present time the problem is how to reduce the revenues sufficiently to aid in economic readjustment. That can not be done until expenses come down, and expenses can not be brought down until the operating costs can be brought down. Consequently, it seems to me, if the railroads are to be of the greatest possible aid in the economic readjustment, they must be in position to bring about their reduction on those classes of traffic which will do the country the most good in an economic way.

Now, the effect of destroying these passenger fares, it seems to me, would be absolutely to destroy the ability of the railroad companies to translate any of these reduced operating costs into reduced rate charges. For instance, in the eastern part of the country alone, where you will see from the map that many of them did not conform to the orders of the Interstate Commerce Commission, if the fares there were reduced, to the 3-cent basis, I am told by Mr. Wettling that the effect on the revenues of the carriers would be to reduce the revenues about $80,000,000 per annum. If those 2-cent passenger fares went into effect and were made the interstate rates, as they would, on the revival of the State rate of 2 cents per mile, the effect in the eastern district alone would be to reduce the revenues $173,000,000 per annum.

Now, what the effect would be throughout the country I have not had an opportunity to calculate as yet, but the net revenues of the carriers to-day are scarcely more than those required to pay their interest charges. And if $100,000,000 or $200,000,000 be subtracted from those net revenues solely by the revival of those passenger fares and that is to be expanded by further losses by inability to maintain freight rates on a proper level, it only requires a very simple mathematical calculation to see what the effect of this proposed legislation, if it should have the effect of striking off these orders of the Interstate Commerce Commission, would be to put the carriers back practically where they were when the transportation act was passed, and that is with net revenues, of something like $200,000,000 or $300,000,000 or materially less than their fixed charges, which are a half billion dollars.

FREIGHT RATES COULD NOT THEN BE FURTHER REDUCED.

And even if the effect would not be as great as I have suggested—and it seems to me it would be greater—it seems to me the effect of anything like that would absolutely destroy the ability of the railroad companies to respond in reduced freight charges, or to translate any of the benefits that come from decreased costs into decreased rates.

I can not conceive of anything that would impede the orderly use of our transportation systems, through the orderly activities of the carriers, and through the orderly activities of the Interstate Commerce Commission in cooperation with the State commissions, to make these agencies of most use in aiding in the economic reduction in freight charges, than the passage of a law that would strike off these orders of the Interstate Commerce Commission and take off at once from the carriers as much or more money than they can hope to save in the immediate future in the way of operating expenses.

Nor can I conceive of anything that would be a greater blow to the financial integrity and to the future of the railroads, than the passage of this proposed legislation.

We are all suffering to-day from the times through which we are passing, the business depression which is the aftermath of the World War. The carriers have suffered along with other industries, as is indicated by the inadequate revenues of the present time. We are all suffering. We are all hoping that some day it will be better. But the carriers need to-day the protecting hand of the Government in a legislative policy which will protect the revenues

of the carriers, not in their selfish interest, but in order that the carriers may provide adequate transportation for the benefit of the country as a whole, just as much as they did when the transportation act was passed. And I can not conceive of anything that would be a greater blow to their opportunity to realize the net revenues which they require than the passage of the legislation which is proposed.

I stand here in favor of a broad interpretation of the powers of Congress which will permit the Interstate Commerce Commission, in the interest of commerce as a whole, to regulate these matters in a reasonable way and in a practical way, leaving to the States the wide field which is theirs, in the legitimate adjustment of rates within their own borders. That, I think, is essential if regulation of these carriers is going to be a success.

Senator STANLEY. Right at that point let me ask you: Is there any reason whatever for maintaining any kind of relationship in the carriage of passengers, at least between the service and the cost of the service?

Mr. WOOD. I think there is.

Senator STANLEY. We will take it here in New York, around New York City and New Jersey, and New York State and Connecticut—I do not know exactly what the population is per mile, but it is a very dense population. The cost of transporting passengers per passenger in full cars running every hour or two, in my opinion, would be necessarily much less than the cost of transporting a passenger the same distance in Montana, or North Dakota, or northwestern Texas, and yet from this map the Interstate Commerce Commission has fixed a flat rate of 3.6 cents per mile in that congested community, and in those thinly populated areas. The cost must be four or five times as much per passenger as it is here.

Mr. WOOD. About that, Senator, I can not say. The cost figures sometimes are very surprising. Sometimes we are surprised that the density of travel has not reduced the cost in the proportion which might be expected. There is a much greater frequency of service in those densely populated countries, and there is a much greater proportion of terminal expense. I know, on our own system, one of the best paying trains we have is a train that runs through the sparsely settled countries. It is a through train; carries a large number of through passengers. In other words, they have been able to condense the passenger travel on that train, so that the cost on this train is probably no more than in New York. Now, the sparsity of population is such that we do not run many trains, and do not have to, and I think it may be a question whether the cost of transporting passengers in New York, per passenger mile, is any less than in other parts of the country. But those are things that it seems to me must be referred to the judgment of somebody. Now, the body that has been created to determine that is the Interstate Commerce Commission. They determine that from the evidence——

Senator STANLEY (interposing). It appears in this case that they did not determine it from any evidence.

Mr. WOOD. I do not think that is a correct statement of the situation. There was a vast amount of evidence. And in those States that have statutory passenger fares, almost all of them said, in so many words, that if they could they would raise the rates. They did not do it because they did not have the power. They recognized that the rates should go up as the interstate rates had gone up.

Senator STANLEY. Right at this point, why not amend this act, then, in such a way as to provide that in the event the Interstate Commerce Commision and the State commisisons shall agree upon a rate, that rate shall be binding upon the States, the commerce acts of the States to the contrary notwithstanding? It would be, any way.

Mr. WOOD. That, sir, it seems to me, would be simply transferring power to the State commission instead of the Interstate Commerce Commission.

Senator STANLEY. So far as intrastate traffic is concerned.

Mr. WOOD. I believe there is a wide field for cooperation between the State commission and the Interstate Commerce Commission.

Senator STANLEY. Right at that point, if the Interstate Commerce Commission has absolute power to fix all rates, with or without investigation, what is left for your State commission to do?

Mr. WOOD. It has not the power to do it with or without investigation, and it has investigated.

Senator STANLEY. All right, then, leave that out—with or without investigation. They will determine whether it is proper or not; they have the absolute power to fix all rates, over all lines that have any connection, however remote,

with interstate commerce in the carriage of passengers and freight; when you give that power to the Interstate Commerce Commission, what is left for the State commission to do? It can not fix any rates.

Mr. WOOD. I think that would be an exercise of constitutional power on the part of Congress. But that is not what Congress has done. Congress has left to them the power to fix the rates within their own borders, except where they has discriminated against interstate commerce. And, as I have said, that does leave a State that wide discretion.

Senator STANLEY. But do you believe, when the Interstate Commerce Commission fixes a flat rate all over the United States—raises all traffic a certain amount—that it can be held by any strained construction that they have investigated every rate, and every point, and every case?

Mr. WOOD. They have not investigated every point——

Senator STANLEY (interposing). It follows as the natural conclusion that they could not have investigated all the rates between all the points between Maine and California on all traffic, intrastate as well as interstate traffic.

Mr. WOOD. They did this, Senator; they took into consideration the purposes of the act and the exigencies of the situation; and it was recognized by everybody who appeared before the Interstate Commerce Commission that the situation was such that there must be a general advance in all of the rates, and that there was in point of fact very little distinction as to the requirements between one case as compared to another. And they had a tremendous amount of testimony. I think it took some six weeks.

Senator STANLEY. As you see it, they received some implied power, and they think it is necessary to raise this amount of revenue——

Mr. WOOD (interposing). No.

Senator STANLEY (continuing). And that the necessities of the case supplemented any need for consideration; and they exercised this power because there was need, and exercised it whether they had the power or not?

Mr. WOOD. They undertook to carry out the expressed mandates of the Congress. They did not have every rate before them, but they had representative cases, stated by the witnesses to be representative. That evidence was not for the most part denied, and where it was denied and an issue of fact was joined, as it was in some of the freight cases, the Interstate Commerce Commission passed on them, and sometimes held with the carrier and sometimes with the State. They did not act just out of the hand.

Senator STANLEY. But they did make a flat rate?

Mr. WOOD. They did make a flat rate.

Senator STANLEY. A flat-rate adjustment?

Mr. WOOD. Of course that goes to whether they exercised their judgment wisely or unwisely. If it is a matter directly within the realm of their judgment, then their judgment stands. If it is a matter that goes beyond their judgment and which is beyond the discretionary power of the commission, it is subject to review by the Supreme Court. I do not see how you can deal with the Interstate Commerce Commission differently from any other tribunal. You must give them jurisdiction, and their power must be final to the extent they do not overstep their power.

Senator STANLEY. Right there, you say we must give jurisdiction; we can not give jurisdiction. We can authorize a commission to perform certain legislative acts, in a way. The courts have held, as I understand it, that we can confer upon this commission such authority as we have, but it is doubtful to my mind whether Congress has an authority to make a broad and sweeping adjustment of this kind if there was no commission. And if Congress has not the power, how can it grant a power that is not vested in it?

Mr. WOOD. Now, of course, you are coming to the question of power, and Mr. Thom, I understand, before the conclusion of these hearings will discuss the question of power.

Senator STANLEY. That is what I want to hear.

Mr. WOOD. I am assuming that Congress had the power to do what it did do. And I am suggesting the necessity for a broad policy on the part of Congress, and a broad interpretation of that power so that the Congress may act in a broad, comprehensive way.

Senator STANLEY. Right at that point I would like to have you cite me the authority of the Interstate Commerce Commission; where do you find it in the act?

Mr. WOOD. In section 13.

AMENDMENT WOULD NULLIFY FEDERAL SHANDARD FOR MAINTENANCE OF TRANSPORTATION FACILITIES.

Now, on the question of the State rates, whether revenue is a proper matter to be considered in a discrimination case or not, the control of State rates, where necessary to remove discrimination against interstate commerce, and the absence or presence of that power of control does necessarily have a powerful effect on the revenues of the carriers, and as against this broad policy that I have urged, I want to read from the brief of Mr. Benton in the New York case, at page 30, in which we have the view of the spokesman of the National Association of Railway and Utilities Commissioners as to the relation between section 15a and the State and Interstate Commerce Commissions, respectively. After repeating what that section is, he says:

"The commission is commanded to exercise 'its power to prescribe just and reasonable rates,' so that carriers shall earn a return 'as nearly as may be,' which means as nearly as the commission can by its order provide, upon the aggregate value of their property."

And then, after some discussion dealing with the activities of the State commissioners, he says:

"If rates prescribed by State authority should be too low, and because of that fact the net railway operating income should fall short of producing a fair return on the aggregate value of all carrier property, it will still be 'as nearly as may be' to that return, by reason of anything that this commission may do."

In other words, Mr. Benton suggests that when Congress says that the Interstate Commerce Commission should see that the carriers should earn 5½ or 6 per cent on the value of their property, it meant that the Interstate Commerce Commission should see that they should earn that to the extent that the States permitted it.

Senator STANLEY. You then interpret section 15a as a guaranty of a certain return?

Mr. WOOD. No, sir; it is far from a guaranty, but it sets a standard that is necessary for the preservation of interstate carriers as interstate instrumentalities.

Now, manifestly, if any body, any part of the Government, has authority to set that standard it must be set by the Federal Government only. And it seems to me that the setting of that sandard is the proper exercise of that authority. It would be a backward step, whatever the proper national standard is, whether properly expressed in section 15a or in some other way, it would be a backward step for Congress to enact a statute which would carry out what is unequivocally and unmistakably the view of the State commissioners, viz: That whatever that national standard is it should be realized only to the extent that the States would permit it to be realized, and no further.

Senator SMITH (presiding). There is just one question in connection with the question propounded by Senator Stanley in reference to the uniformity of these rates without regard to the density or thinness of population. Is it not your opinion that, perhaps, the Interstate Commerce Commission had in mind, when making these flat rates, these uniform rates, that the density of the population, and necessarily the nature of the road traversing different sections, and that they had in mind the provision of the transportation act, that the amount that a given road earned was limited, and that any excess would go to make up any deficit that might occur elsewhere, and that, therefore, the general situation would be taken care of without undue or enormous earnings in one section as against loss that might be incurred in another section?

Mr. WOOD. I could not say, Senator, whether they had that specific thing in mind or not.

Senator SMITH (presiding). That is one question. Would there be any justification, then, in putting a 3.6-cent rate in New York, where everyone knows it is notoriously a fact that they carry to full capacity, perhaps, of their transportation facilities, and their earnings necessarily would be out of all proportion to the thinly populated States where the same rate obtained? It does not answer the question to say that they have more numerous trains.

Senator STANLEY. If they have more numerous trains, they have opportunity, and they are bound to make more money on the same roadway and equipment. Anybody knows that without being an expert.

Mr. WOOD. I could not say, Senator, whether they took into account this specific thing of which you speak. But they did have section 15a, which required them to look at it in groups and disregard State lines. They did have that in mind.

Senator SMITH (interposing). There, you see, you run into a contradiction when you say we must take into consideration a discrimination in the revenue. Now, where the revenue is so great as to more than meet the requirements for a given road for that community, there would be no justification whatever in maintaining the rate when the return on the property used for the public use was inordinately excessive; and yet, when you reduce it in order to have a rate that was in proportion to the investment, you would then have a rate there that would discriminate against an interstate passenger who goes from a thinly populated section into a congested section, which would be discriminating against him by force of the economic situation over which you and I have no control. You have a discrimination there by virtue of the revenue which you must provide, and which you must take into consideration, and any excess revenue earned there goes to make up the loss of the revenue in a less favorable situation where the revenue is not so great.

Mr. WOOD. And that is, of course, one of the things that the California commission referred to, in the passage which I read, as indicating the necessity on the part of the States to cooperate in order to make the whole program effective.

I think that is all I have to say and I thank the committee very much for its courtesy.

I desire, Mr. Chairman, if I may, to put into the record the opinion in the California case.

Senator SMITH (presiding). It may be printed in the record.

(The opinion referred to is printed in full, as follows:)

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

OPINION.

In the matter of the application of steam and electric interurban railroads and boat-line common carriers to increase freight and passenger rates and fares, Application No. 5728.

This is a joint application by practically all of the steam railroads, electric interurban railroads, and boat lines operating in California.

The commission is asked to authorize these carriers to increase freight and passenger rates and to assess a surcharge upon passengers occupying sleeping and parlor cars on all intrastate business to the same extent as authorized by the Interstate Commerce Commission in an order made on the 29th day of July, 1920.

At the hearings herein applicants introduced no evidence except the order of the Interstate Commerce Commission above mentioned, together with the applications made to that commission which resulted in such order.

Applicants took the position that evidence of value of property used in the service, gross and net income, etc., such as is usually introduced in a proceeding of this kind, was wholly irrelevant because the Interstate Commerce Commission, acting under the act of Congress ordinarily designated the Esch-Cummins Act, had authorized an increase of rates for carriers under its jurisdiction, and in determining the amount of such increases had included all revenue earned by these carriers on State as well as interstate business.

The Esch-Cummins Act provides, among other things, that the Interstate Commerce Commission shall fix rates for carriers under its jurisdiction in the following manner: Either treating the carriers of the United States as a whole, or as a whole in each of such rate groups or territories as the commission may from time to time designate, to fix the value, using certain prescribed methods, of the property devoted to the service of the public, and to so fix rates as to return to the owners of these properties 5½ per cent net earnings; or, in the discretion of the commission, 5½ per cent plus one-half per cent, the additional one-half per cent to be administered by the commission under conditions laid down in the act.

The Interstate Commerce Commission divided the United States into four group—eastern, southern, western, and Mountain-Pacific. California is embraced within the Mountain-Pacific group. It concluded that for the Mountain-

Pacific group 25 per cent increase of freight rates and 20 per cent increase of passenger rates was necessary in order that the carriers enjoy the 6 per cent earnings provided by the Federal law.

The Railroad Commission of California is confronted with these alternatives—either it must proceed and take evidence as to valuation, revenues and expenses, competitive conditions, long-and-short-haul violations, and the various other factors to which consideration is given in reaching a conclusion as to the reasonableness of rates, and come to a conclusion based on the conditions in California alone, regardless of the effect the income produced by the rates thus fixed would have upon the action of the Interstate Commerce Commission, or it must proceed in harmony with the decision of the Interstate Commerce Commission and put into effect the assumption that State rates would be increased in harmony with its decision.

We have given this matter very careful consideration and in doing so have attempted to give weight to the probable consequences of proceeding upon either of these alternatives. We realize that, without requiring more evidence than is now before us in this proceeding, to impose on intrastate business the identical percentage authorized by the Interstate Commerce Commission would in effect be the fixing through us of State rates by the Interstate Commerce Commission. Whether or not this constitutionally may be done is a question we do not consider it our function to decide. On the other hand, to proceed in the usual manner as though this were entirely an independent proceeding would result in serious delay, as it is evident that to gather and submit adequate data upon which to base a sound judgment of what practically all transportation rates in California ought to be, would require many months and all possibility of immediate relief to the carriers found to be imperative by the Interstate Commerce Commission would disappear.

This, however, is not the most serious result of independent action by this State. If this commission, under the circumstances that now confront us, fixes State rates regardless of the order of the Interstate Commerce Commission, and if such rate fixing resulted in a return to the railroads of the Mountain-Pacific group less than 6 per cent authorized by the Interstate Commerce Commission, either the Interstate Commerce Commission must further burden interstate commerce with rates high enough to make up the deficit resulting from the California action, or, if legally possible, the Interstate Commerce Commission would be compelled to overrule this commission, or the Esch-Cummins Act would be a demonstrated failure.

It appeals to us that if each State in a given group insists upon wholly independent action and judgment, that the whole spirit and purpose of the Esch-Cummins Act is in danger of nullification.

That act in terms provides a scheme whereby individual railroads and particular States are expected, and no doubt will, produce more than a 6 per cent earning upon the rate base fixed by the Interstate Commerce Commission. This is clearly indicated in the act, because it is provided that where a given railroad earns more than 6 per cent the overplus is devoted to certain prescribed purposes.

There can be no doubt that in order to prevent the annihilation of some of the less profitable roads it was the purpose of Congress to authorize rates which, because of the necessity of maintaining a parity for all roads in a given competitive territory, would return the more profitable roads and unreasonable earning, and faced with the alternative of providing rates which would only make a reasonable earning for the profitable roads and which would destroy the others, Congress determined that rates would be so adjusted as to permit the weaker roads to exist and to continue to function, but at the same time deprive the more profitable roads of the result of overplus of earnings.

It is obvious that this plan can not work if each State or a given group insists upon a determination of its own as to what contribution should be made to the common group income.

It must be realized that the Interstate Commerce Commission, a national body entitled to the respect and confidence of the country, acting under the mandate of Congress, has proceeded impartially, using the best available information and the best judgment of its members in the determination reflected in the order referred to. It has evidently in good faith sought to carry out the mandate of Congress.

It is our deliberate judgment that it is the duty of this commission to cooperate in every reasonable way to give the Esch-Cummins Act a fair trial and, rather than to attempt to impair the success of this legislation, to so act

as to make it successful. Not merely on the general proposition that all laws should have a fair test, but on the more definite situation that now confronts this country. We must all realize that the transportation companies have resumed control of the various railroad properties under difficult circumstances and in view of the vital needs of this country for adequate transportation it is the duty of all citizens and officials to further any movement looking to the bettering of the transportation business.

We feel that regardless of any opinion we might have as to the wisdom or unwisdom of the Esch-Cummins Act, it is the foundation upon which the regulation of the railroads now rests and to shake that foundation would be against the public interest.

We do not mean to say that this commission has abdicated its functions in rate fixing, as we believe that our determination to grant the prayer of applicants is sustainable upon the ground of reasonableness. Furthermore, we realize that we have a heavy responsibility in the matter of adjusting State rates which inevitably will become necessary upon the imposition of a percentage increase. The shippers who appeared before us in this proceeding have taken a very commendable position. Practically without exception they have stated their conviction that the railroads must have relief in increased rates in order adequately to give service. Furthermore they believe that this commission should cooperate with the Interstate Commerce Commission and make effective its order increasing rates. They do urge, however, that this commission keep control of the matter of adjustment of rates after the imposition of a percentage increase.

The carriers have agreed that they will, as promptly as possible, make adjustments or change rates in agreement with their patrons wherever possible without resort to this commission, and as to all disputes or disagreements which may arise they will be promptly referred to this commission for decision.

As to the carriers who are before this commission and who might not be considered to be directly authorized by the Interstate Commerce Commission to increase rates, it is to be remembered that they are in competition with the carriers who will charge increased rates and it is necessary that the relationship of rates between the carriers be maintained.

We will therefore authorize all carriers applicant herein to increase freight charges 25 per cent and passenger fares 20 per cent with a surcharge on Pullman fares of 50 per cent which will accrue to the carriers, and we will further order that this proceeding be kept open for the purpose of considering adjustments of rates and all further appropriate matters which poperly may come before us herein.

ORDER.

Application having been made to the Railroad Commission of the State of California by practically all the steam and electric interurban railroads and boat common carriers engaged in the transportation of persons and property in this State for an order authorizing the increasing of intrastate freight and passenger rates in harmony with the increase authorized under the provisions of the "transportation act, 1920" (Esch-Cummins Act), by the Interstate Commerce Commission in its docket Ex parte 74, decided July 29, 1920, all of which is set forth in the applications and exhibits on file with this commission; public hearings having been held on said application and the commission being fully advised in the premises hereby finds as a fact that the application should be granted. Basing our order on this finding of fact and on the further findings contained in the opinion which precedes this order,

It is hereby ordered, That the application should be and the same is hereby granted and that the applicants steam and electric interurban railroads and boat common carriers are hereby authorized to establish the following increased rates within 30 days from the date of this order.

FREIGHT RATES.

All applicants, steam and electric interurban railroads and boat line common carriers, may increase freight rates as follows:

All freight rates, including switching and special service, may be increased 25 per cent.

ABSORPTIONS.

Where tariffs now provide for the absorption by one carrier of the charges of another carrier in specific amounts, such absorptions will be revised in harmony with increases in charges herein authorized.

PASSENGER FARES AND CHARGES.

All steam and electric interurban railroad and boat line common carriers applicants herein may make the following increases:

1. All passenger fares and charges may be increased 20 per cent. The term "passenger fares" may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges. No increases may be made in street car fares within any municipality except that the Pacific Electric Railway Co. is hereby authorized to increase all of its passenger fares 20 per cent.

2. Excess-baggage rates may be increased 20 per cent, provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess-baggage charges.

3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent of the charge for space in such cars, such charge to be collected in connection with the charge for space and to accrue to the rail carriers.

4. Milk and cream are usually carried in passenger trains, and the revenue therefrom is not included in freight revenue. Rates on these commodities may be increased 20 per cent.

DISPOSITION OF FRACTIONS.

In computing and applying all increased rates authorized herein fractions will be treated as follows:

Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than one-fourth of a cent will be omitted. Fractions of one-fourth of a cent or greater, but less than three fourths of a cent, will be stated as one-half cent. Fractions of three-fourths of a cent or greater will be increased to the next whole cent. This rule will also be followed in computing passenger fares.

Where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts of less than 25 cents will be dropped; thus, $25.24 will be stated as $25. Amounts of 25 cents or more, but less than 75 cents, will be stated as 50 cents; thus, $25.65 will be stated as $25.50. Amounts of 75 cents or more, but less than $1, will be raised to the next dollar.

DIVISIONS.

Where carriers earn specific amounts as their compensation out of through rates or fares, such amounts will be increased in the same percentages as the through rates or fares. Where the divisions of carriers participating in through rates or fares are in fixed amounts per unit and are absorbed by other carriers, such absorptions will be increased in the same percentage as the through rates or fares.

MINIMA.

Present minimum rates or charges are not to be disturbed.

LONG-AND-SHORT-HAUL VIOLATIONS.

Carriers affected by this order are hereby authorized to publish rates, fares, and charges in accordance with this order, which may be in violation of section 21 of the State constitution and of section 24 of the public utilities act.

PUBLICATION OF TARIFF.

The rates authorized herein may be published on one day's notice in a blanket supplement to all tariffs. Such supplement may be similar in character or the same as authorized by the Interstate Commerce Commission.

ADJUSTMENTS.

This proceeding will be kept open for the purpose of considering adjustments of rates and all appropriate matters which may properly be brought before the commission.

Adjustments will be necessary and carriers will be expected to deal promptly and effectively therewith, to the end that such readjustments may be made in as many instances as practicable without forcing an appeal to this commission.

Dated at Los Angeles, Calif., this 17th day of August, 1920.

EDWIN O. EDGERTON,
H. D. LOVELAND,
FRANK R. DEVLIN,
H. W. BRUNDIDGE,
IRVING MARTIN,
Commissioners.

A true copy.

H. MATHEWSON,
Assistant Secretary Railroad Commission, State of California.

Mr. BENTON. Mr. Chairman, Mr. Wood has referred to some language used in the brief which I filed in the New York case, and if it is not an unreasonable request I would like permission to read into the record certain parts of that brief, covering fully the matter referred to by him. I would like to read that into the record.

Senator SMITH (presiding). That may be read if there is no objection.

Mr. BENTON (reading):

"STATE RATES PRESUMED TO BE REASONABLE.

"Carriers lay special stress upon the argument that it must be presumed that Congress intended to grant to this commission power to control intrastate rates because it has commanded this commission to adjust rates so that carriers as a whole will earn 'an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.' It is urged that the income as described includes the net from all traffic, State and interstate, and that the aggregate value embraces the value of all property devoted to transportation.

"These premises may be admitted without bringing us to the conclusion urged. If it be said that the commission can not know what carriers will earn from intrastate traffic, if it has no control over the rates to be charged, and they may be changed at any time without its consent, it may be replied that rates subjec to State authority are quite as stable as business and economic conditions, and that all Congress expected the commission to do was to make the best estimate possible. The words 'as nearly as may be' indicate that Congress realized that it was merely setting up a mark at which the commission was to aim.

"The point mainly stressed, however, is that Congress must have intended to grant this commission power to control intrastate rates, because otherwise interstate commerce will be unjustly burdened. It is said that if the States impose rates that yield a less return than is fixed by the act or the commission, then, by the terms of paragraph 2 of section 15 (a), the commission must prescribe interstate rates high enough to make up the deficit, and that it is not to be supposed that Congress intended to require interstate shippers to pay more than sufficient to yield a fair return on that portion of carrier property devoted to interstate traffic.

"This argument has no force unless (1) said paragraph 2 does in fact, properly construed, require such overassessment of interstate rates; and (2) Congress expected that State rates would be unreasonably low and would fail to yield a fair return on that portion of carrier property which is devoted to intrastate traffic. Neither of these premises is true.

"As to the first, it has been already pointed out that Congress stated in section 1 that the provisions of the act, necessarily including paragraph 2, shall not apply to intrastate traffic. Inasmuch, then, as Congress in paragraph 2 was not prescribing a rule for the making of intrastate rates, it was not prescribing a rate of return on property devoted to intrastate commerce. The purpose of Congress was to prescribe that this commission, when acting within its sphere

for the regulation of interstate rates, should fix such rates on the basis of the aggregate value of roads within groups or districts rather than on the basis of the value of particular roads.

"The commission is commanded to exercise 'its power to prescribe just and reasonable rates' so that carriers shall earn a return 'as nearly as may be,' which means as nearly as the commission can by its order provide, upon the aggregate value of their property. If it be admitted that Congress had in mind total net railway operating income earned from all traffic, State as well as interstate, and total aggregate value of property devoted to all traffic, it did not expect this commission to exercise control over the income from the intrastate traffic, for it had expressly withheld the intrastate traffic from this commission's control. It intended this commission in adjusting rates to do what it could to enable carriers to earn the income prescribed, acting 'in the exercise of its power' to regulate interstate rates.

"If rates prescribed by State authority should be too low, and because of that fact the net railway operating income should fall short of producing a fair return on the aggregate value of all carrier property, it will still be 'as nearly as may be' to that return, by reason of anything that this commission may do 'in the exercise of its power to prescribe just and reasonable rates,' If it should attempt to increase the rates subject to its supervision to an amount more than is necessary to yield a fair return on the value of carrier property devoted to interstate traffic, such rates would be violative of paragraph 6 of section 1 of the act, and also of this very paragraph 2, which restricts the commission to the imposition of 'just and reasonable rates.'

"These considerations seems to dispose of the suggested construction that this commission must make up a shortage of intrastate revenue, if there is any. * * *

"As to the second premise, there is no reason to say that Congress acted upon the assumption that rates prescribed by State authority would be unreasonably low, and would thus yield less than a fair return, but that there are compelling reasons for saying the opposite.

"In the first place, carriers have a constitutional right to a fair return from their State traffic upon the value of that portion of their property devoted thereto, and Congress was justified in assuming that the courts would protect the carriers in the enjoyment of that right.

"Next, and most important, it would be unseemly for Congress to legislate upon the theory that the States which compose the Union require to be dragooned by any Federal authority into granting to the carriers their rights under the Constitution. It is not a fact that the people of the several States, through their legislatures and the regulating bodies which by law they have created, are not disposed to act justly and in obedience to the supreme law of the land.

"It may be said that Congress knew that there were certain statutes prescribing rates of fare less than the rates which were in effect under Federal control, and hence that it can not be supposed that it assumed intrastate rates would be reasonable, if no means for making them so by Federal authority was provided. But, as we have just pointed out, Congress was justified in assuming that the courts would protect the carriers against the imposition of confiscatory rates. The event has proved the safety of that assumption, for carriers have easily obtained temporary injunctions, which have relieved them from applying fares lower than the fares in effect under Federal control. These injunctions will afford the legislatures opportunity to act, and if the statutes are not modified the injunctions may be made permanent, if the facts warrant.

"Also, by section 208 (a) of the transportation act, Congress provided that rates and fares in effect at the termination of Federal control should continue in effect 'until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law.' * * *

"The assumption of Congress was, we think it is fairly evident from what it did, that the State authorities would do their duty in the same spirit that it expected this commission to do its duty. It left in the hands of this commission the power to remove discriminations by mandatory orders, but it provided that in every such case the State or States interested should be notified, and it gave this commission the authority it asked for to enter upon a joint hearing with State regulating authorities. It is reasonable to believe that Congress expected that the authority which the commission had asked for (to hold joint conference with State commissions) would be used, and that ordinarily the

views of the State and Federal authorities would be accommodated, and agreement arrived at, as to what rates should be put into effect. * * *

"In less than two months after the advanced rate hearings had been completed orders had been actually issued, or advances had taken effect without order, in all States but three. Leaving out of account for the moment action with respect to passenger fares in States having passenger fare statutes, the results in these States may be summarized as follows:

(This tabulation appears in the hearing, Pt. I, p. 28.)

"Under these circumstances it is lamentable that carriers have seen fit to precipitate this litigation, which is aimed, as we believe, at nothing less than an attempt to secure from this commission a construction of the present provisions of the interstate commerce act which, if sustained, will destroy all effective power of State commissions over intrastate rates.

"It is not to be presumed that there is anything wrong with any of the orders which State commissions have made in the cases to which we have referred. If, in fact, they ought to be modified in any way, it is not to be presumed that any one of those commissions would not only be ready, but anxious, to make any change shown by facts, called to its attention, to be necessary. Is there any reason to expect that, proceeding along the line outlined by Chairman Clark (in his statement to Congress, reproduced in this hearing, Pt. I, p. 17), it can not, by further common study and joint conference, be determined, to the agreement both of any State commission and of the Federal commission, whether State or Federal order, either or both, should be modified in any respect?

"The State commissions have in the main granted the full increases asked of them by the carriers, so far as under the statutes of their States they had power to act. Now they see carriers, upon the ground that they have not been granted everything they asked in every State, beginning litigation intended to procure a construction of the law which will destroy the power of all State commissions to serve the people of their respective States in the manner prescribed by their statutes. We believe they are justified in feeling that this is not a wise contribution on the part of carriers toward a satisfactory and permanent solution of the transportation problem.

"If the act is to be construed as the carriers are now seeking to have it construed, then, State commissions have no proper place in any joint conference or joint hearing. This commission doubtless took that view, since it is proceeding in all these cases as if the cooperative provisions were not in the act. We believe, however, that this commission, after full consideration of this case, will adhere to the interpretation heretofore consistently put upon the discrimination provisions of the act, and will hold that the record which the carriers have made in this proceeding affords no basis upon which discrimination can be found. If it does make that decision, and this and other cases like it are dismissed, it will then be possible to give the cooperative provisions of the act a fair trial.

"If that is done it may be expected, not only that such discriminations as are within the inhibition of the act may be abated without use of the commission's mandatory power, but that any disadvantages, not falling within the description of discriminations, which may be found to arise from State-made rates, if any, can be abated, if the attempt is made in the same spirit as that indicated by Chairman Clark's statement of Congress, which has been heretofore quoted."

STATEMENT OF MR. BIRD M. ROBINSON, PRESIDENT OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION.

The CHAIRMAN. Mr. Robinson, will you state your name, residence, and your relation to this subject that we are investigating?

Mr. ROBINSON. Bird M. Robinson, residing in Washington temporarily. I am president of the American Short Line Railroad Association. That association consists of 518 of the smaller and weaker roads of the country.

I have been absent from the city during most of the time you have been conducting these hearings, and my knowledge of the testimony presented is very limited. I have not had an opportunity to read in full the testimony of any of the witnesses, but have hurriedly scanned the testimony of the representatives of the National Association of Railway and Utilities Commissioners, and have noted the proposed amendments that they have submitted for your consideration.

A MOST CONSTRUCTIVE LAW.

My association has been of the opinion that the transportation act was one of the most constructive acts that Congress had passed in a great many years. We think it is comparable to the act creating the present Federal reserve system. We have operated under it, and while we have not accomplished much that we had hoped to accomplish, we have felt that the act itself has not yet had a fair test, that the conditions following the war have been such as to prevent a thorough test as to the effect of the principles incorporated in that act.

The Interstate Commerce Commission has placed upon some of the clauses of the act an interpretation that affects our lives and which we think is contrary to the act itself. The commission has suggested that we come to Congress and ask that the sections be amended so as to clarify the act. We have not thought that desirable; we have felt that the law was sufficiently plain that we would succeed in getting those things that were necessary to enable our class of roads to succeed without asking Congress to change the act. We hoped, and we still hope, that we can induce the commission to place the correct interpretation upon the act. For that reason we have not asked any amendment, and we do not now intend to do so.

JURISDICTION OF INTERSTATE COMMERCE COMMISSION.

I understand that the proposition to amend the interstate commerce act so as to clearly define and limit the power of the Interstate Commerce Commission in so far as intrastate rates are concerned has been discussed at length by the witnesses produced by the Association of Railway Executives and the witnesses of the National Association of Owners of Railroad Securities and I will not, therefore, consume your time in discussing that question.

I will say, however, that I am of the opinion that it would be a serious mistake to limit or restrict the powers of the Interstate Commerce Commission in its control of the general rate situation. I am advised and believe that about 85 per cent of all the freight traffic of the country is interstate and that only about 15 per cent is intrastate, and I feel, for that and other reasons that it would be detrimental to limit the powers of the Inerstate Commerce Commission to such an extent as to permit any authority to put into effect rates or conditions of service that will place a burden upon interstate commerce.

NATIONAL WELFARE IS NECESSARILY PARAMOUNT.

I was raised as an old line Democrat and was a firm believer in the doctrine of State Rights, but have long since been forced to yield my views with reference to the rights of the States when confronted with paramount conditions in which the people of the United States at large were interested, which interest at times necessarily conflicts with the views of the citizens of some of the States.

Senator STANLEY. Suppose it conflicts with the rights of the citizens of some of the States, what then?

Mr. ROBINSON. Then it can not be enforced. Rights are rights, and must be respected.

I am convinced that the rail transportation carriers of the country are by force of circumstances a national unit and a national asset, and must be so treated.

Believing that to be true, I feel that nothing should be done to deprive the Interstate Commerce Commission, as the agency of Congress, to control that transportation unit to the extent that it may be necessary to insure the most economical and most efficient transportation that is obtainable, and therefore I do not believe that it would be wise to limit the commission in the manner proposed; and I feel that if it is done, it will result in retarding, to a greater or less extent, the full development of the transportation system of the country.

SELECTED SUBJECTS.

To avoid repetition I will therefore confine my testimony, first, to the demand of the National Association of Railway and Utilities Commissioners that Congress repeal section 15a of the interstate commerce act, and, second, to the proposal that paragraph 20 of section 1 of the interstate commerce act be so amended as to require the approval of the State authorities before a certificate of abandonment issued by the Interstate Commerce Commission shall become effective.

ALLEGED WORTHLESS RAILROADS.

With a view to affording a convenient reference, I read into the record a paragraph from the preamble of resolutions said to have been adopted by that association in Atlanta on October 11–14, 1921:

"Whereas under such group plan the worthless roads of the country, ill-considered ventures, duplicated lines, speculative enterprises, and roads that have served their useful purpose and outlived the industries which once justified their construction, are valued with the good, and the good roads are given the right to earn upon their own value and also upon the value attributed to such worthless roads, which can not earn because they perform no sufficiently useful service in the actual movement of traffic to enable them to earn."

I also read into the record, for like purpose, that part of the resolution said to have been adopted:

"*Resolved*, That it is the sense of this association that the group plan of making rates, prescribed by said section 15a, is uneconomic and unsound and that the attempt, under its provisions, to produce returns upon roads that are unable to earn returns themselves, has placed an unjust burden upon the business of the Nation, from which it should be relieved by the immediate repeal of said section 15a."

REPEAL OF SECTION 15A.

I assume that that part of their preamble, which I have just read, is the sole and only basis for that part of the resolution which I have read, and that the reasons therein stated are the sole and only bases for their demand to have section 15a of the interstate commerce act repealed and the group plan of dealing with the basic problem of adequate revenues must be abandoned.

The reasons given in that preamble and resolution do not justify the repeal desired, nor do they justify the abandonment of the only plan which can be successfully used in this country as a basis for rates if all parts of our transportation system are to continue to function and give to the public that efficient service which they demand and are entitled to receive. That result can not be successfully accomplished except under the group plan.

RATES MUST BE SUFFICIENT.

As a fundamental proposition, I assert that rates must be sufficient to pay the carriers the cost of producing the transportation and that cost must include a fair return on the value of the property held and used for public service.

Senator STANLEY. Now, do you mean intrastate and interstate rates, both?

Mr. ROBINSON. Generally speaking, in a broad sense.

Senator STANLEY. And Congress shall see that it is done?

Mr. ROBINSON. That is not the proposition I made, Senator, if I may repeat it. I will give you this last sentence again, so that it may be clear to you. As a fundamental proposition, I assert that rates must be sufficient to pay the carriers the cost of producing the transportation and that cost must include a fair return on the value of the property held and used for public service. That is a general proposition, and not limited to Congress or limited to the States. That is a fundamental proposition.

Senator STANLEY. That is the rule that the Interstate Commerce Commission must apply to interstate commerce. Now, you are going to extend that to strictly intrastate traffic?

Mr. ROBINSON. That applies to both. I think that is a fundamental proposition as to carriers.

Senator STANLEY. Yes.

TO SERVE AT PERMANENT LOSS IS CONFISCATION.

Mr. ROBINSON. The courts have held in many, many cases that carriers can not be compelled to operate at a continuous loss.

In the case of Brooks Scanlan *v.* Commission (251 U. S., 396) the Supreme Court held in effect that a railroad, although devoted to a public use and affected with a public interest, and hence subject to public regulation and control, remains private property and is protected by the constitutional guaranty made to such property that it shall not be taken from its owners without due process of law, nor be taken for public purposes without a just compensation. The

devotion to public use does not mean devotion to public consumption and destruction, and by no sort of regulation can a railroad be compelled to operate at a continuing loss.

MUST HAVE REASONABLE RETURN.

The Supreme Court held in Missouri Pacific Railway Co. (236 U. S., 585) and Norfolk & Western Railroad Co. *v.* Connelly (236 U. S., 605) that the interested carriers could not be forced to operate without receiving a reasonable return on the money invested in the property devoted to public use.

COST IS BASIC.

The decisions of the courts and the interstate commerce act necessarily make the cost of producing transportation the basis of rates and divisions, and this is the only basis upon which a successful transportation system can be maintained and operated. In ascertaining such cost the Government, representing the public, has the right to investigate and govern to a great extent the various elements that constitute that cost.

ECONOMY OF OPERATION.

The transportation act authorizes and directs the Interstate Commerce Commission to see that the carriers are efficiently and economically managed and operated. Costs vary widely because of difference in conditions.

ILLUSTRATION OF COMPARATIVE COSTS.

The cost is vitally controlling in every character of transportation. For example, taxicab companies furnish transportation in the cities to persons desiring service of that kind. As a rule the taxicabs cost from $1,000 to $1,200. They operate upon streets constructed and maintained by the cities. In the ordinary city they charge, say, 50 cents for transporting one passenger 1 mile. Some of the citizens use cabs and pay that price, regarding it as a reasonable charge for the transportation for 1 mile to a railroad depot. Such a passenger, upon arriving at the railroad station, takes a train and will enter a car costing probably from $30,000 to $50,000. That car will be moved by an engine costing from $50,000 to $100,000 over a track that will cost on the average $40,000 to $50,000 per mile, and will pay only 4 cents per mile for such transportation, it having been determined by the Interstate Commerce Commission—and I might add by other commissions and by experience—that 3½ to 4 cents would cover the cost of the service to the railroad, whereas the same individual willingly, or by choice, pays 50 cents per mile for the service of the taxicab. The reason for the higher charge of the taxicab is the limited amount of traffic available, which necessitates a far higher rate per unit of transportation produced, but yet no one would contend that the cab is worthless and should be destroyed.

Yet a large per cent of our citizens are now complaining that the railroad rate is too high.

LIGHT TRAFFIC MAKES HIGH COSTS.

The same principle of costs necessarily must govern different carriers. The main trunk roads because of the density of traffic can produce units of transportation at a comparatively low cost——

Senator STANLEY. You mean now, less than 4 cents a mile?

Mr. ROBINSON. This has no reference to that 4 cents, Senator. This is speaking now of the general cost of service.

Senator STANLEY. Yes.

Mr. ROBINSON. I will repeat: The same principle of costs necessarily must govern different carriers. The main trunk roads, because of the density of traffic, can produce units of transportation at a comparatively low cost, whereas for lines of vital importance but with light traffic, the unit costs which must be met out of rates, are necessarily higher. In both instances, however, the cost should include all proper expenses, taxes, depreciation, and a fair return upon the property devoted to the public service.

DISSIMILARITY OF COSTS.

One carrier (A), because of low grades and dense traffic, may be able to transport its freight tonnage at a cost, including all expenses and a fair return, of say 1 cent per ton mile; while another line (B) equally well constructed and hav-

ing an equally dense traffic, but being built in mountainous country at a heavy construction cost, may not be able, even though most economically managed, to move its traffic for less than 2 cents per ton mile; and still another road (C), less expensively built, with less density of traffic but having heavy grades or other physical obstacles, may not be able to move its traffic at less than 3 cents per ton mile. And a fourth line (D) which penetrates a thinly populated district, and being cheaply built, may not be able to move its traffic at less than 5 cents per ton mile.

COMPARATIVE COSTS NO TEST OF WORTH.

The wide differences in the cost of producing the transportation has led some people to hasty conclusion that the road with high cost of operating is either worthless, or is an ill-considered venture, and should be abandoned. That view is altogether erroneous. The whole public is interested in all of the traffic on all of such lines and must have the transportation furnished by each. It is apparent that if any considerable portion of the lines with the higher cost ratio should be discontinued it would immediately result in reducing the volume of traffic fed to the remaining lines, and that, in turn, would decrease the density of the traffic and increase the cost on the remainder.

HIGH UNIT RATES IMPOSSIBLE.

The people living in regions served by light traffic lines can not pay rates corresponding to the high unit costs, and can neither prosper nor survive in competition with communities which might have rates corresponding to the low unit costs of the dense traffic carriers by which they are served; but it is obvious that public policy demands that there be no such extreme condition of inequality if there is to be anything like a well-rounded national development.

It is of equal importance to the regions of low unit costs to receive the products of the fields, the forests, and the mines, as it is to the regions of high unit costs to produce and market their products; and that fact is at once the reason, the justification, and the necessity for some practical system of equalization.

EQUALIZATION OF GROUP COSTS.

That result can not be accomplished by dealing with the carriers separately. It can only be accomplished by placing them in groups and fixing rates on the traffic moved by all of the carriers in each group so as to give to all the cost of their service. It is true that owing to the density of the traffic and the present divisional arrangements some lines may apparently show earnings in excess of a fair return, but the rule of divisions was incorporated in the transportation act to give to each line the cost of its service, and thus insure a continuation of all of the necessary units of the system in each group.

FALLACY OF ALLOCATING STATE COMMERCE.

Mr. Benton, general solicitor of the National Association of Railway and Utilities Commissioners, discussed the group plan in his testimony and I read the following from page 188 of the printed report of the hearings:

"What the commission's ruling comes to is nothing more or less than that under the group plan of rate making prescribed under section 15a which Congress is now asked to repeal. The commission may compel the shippers upon roads in one State to pay more than is necessary to yield a fair return on those roads to make up a deficit in desired earnings on other roads in other States."

That statement is fallacious and unsound. It ignores the fundamental principle that our transportation system is an entirety and that each and every unit is necessary to make up the whole. It assumes that they are State roads. In other words, that there are carriers in which only the citizens of a particular State are interested and it assumes that the earnings of a road or a given part of a road which may be located in one State, are of interest only to the citizens of that State and that the citizens of other States have no interest therein.

This, notwithstanding the fact, and it is a fact, that in many instances a carrier or a part of a carrier in one State may show larger earnings therein notwithstanding the greater portion of its traffic originated in some other State or States and merely moves through the favored States such as he has in mind.

In such cases the citizens of the intermediate States have much less interest in the success of that part of the road in question than the citizens of the other States which originate or receive the traffic.

NO STATE LIVETH ALONE.

I could enumerate thousands upon thousands of instances to demonstrate that the welfare of the Nation at large is the real interest to be considered and that the interest of the local State is small in comparison.

Let me give you an illuminating example where I have full knowledge of the facts:

About 15 years ago, I constructed the Tennessee Railway, penetrating into the mountains of east Tennessee, a distance of 62 miles. The territory in question was surrounded by a high range of mountains and contained approximately 500,000 acres of hardwood timber. Practically all of that whole acreage is underlaid with seven workable veins of bituminous coal, the largest vein being about 7 feet thick.

I participated in constructing on that road the largest hardwood sawmill in the world. Soon after its construction it was sold to the Globe-Wernicke Co. of Cincinnati. That company is probably the largest producer of filing cases, office furniture, etc., in the world, and it has since drawn its supply of hardwood from that mill on the Tennessee Railway.

The Globe-Wernicke Co. has supplied and is now supplying to the Government in this city a large per cent of its filing cases, desks, and other office furniture, and it supplies its products to the public not only throughout the United States but in all sections of the world.

Some coal mines have been developed upon that road, but, owing to some serious controversies among the owners of the principal coal properties in that territory, the coal development has not been large. There are billions of tons of coal in that territory that can only be reached by the Tennessee Railway, and there is something like 3,000,000,000 feet of hardwood timber yet to be moved off that road.

Notwithstanding that great amount of available traffic that road has never been able to pay any return on the money invested in it. Its rates have been fixed by governmental authority and its divisions have been fixed by the connecting lines, and hence it has not been able to accomplish much more than pay its operating expenses, and at times it has not earned its operating expenses.

Senator STANLEY. Let me interrupt just at that point. The trouble seems to be in the division that comes to that road. The commission has a right to adjust that division of rates, as I understand it, now?

Mr. ROBINSON. The statement was made both as to rates and divisions. Its rates have been fixed by governmental authority, and its divisions have been fixed by the interested lines, so that the two were involved. The Interstate Commerce Commission has in that case acted and prohibited it from charging what were regarded by its owner—and I was the owner—as adequate rates. Notwithstanding the great volume of traffic which that road has available, notwithstanding that in the future it will have to be double tracked or more to handle the business that must come out of there, it has been termed a worthless railroad, and has never been able to make any earnings or pay any interest on the funds invested in it.

In view of the facts stated, it must be admitted that the consumers of hardwood, the purchasers of the filing cases, desks, and other office furniture throughout the 48 States and the District of Columbia and our island possessions are directly interested in the Tennessee Railway. In fact, they are as much interested as are the local people on the line. They consume its products, they have the benefit of the service it renders, and they are interested in having it continue so that the vast amount of raw material yet to be moved may be made available for the benefit of humanity. It can not be said truly that that property which is located in one State is exclusively of interest only to that State.

STATE ROADS ARE UNITS IN NATIONAL SYSTEM.

I assert that the Tennessee Railway is a part of the transportation system of the whole Nation, and that it produces a substantial volume of traffic which moves not only in Tennessee but throughout all parts of the United States, and

goes to remote parts of the earth. It performs its part of the transportation required by the public, and it should receive in return the cost of its service.

Senator STANLEY. Do you mean to state that without qualification?

Mr. ROBINSON. That it should receive in return the cost of its service?

Senator STANLEY. That that road should be allowed to receive a rate that would compensate that road for the service rendered, or pay a sufficient return on the capital investment, without regard to any other consideration or any other road or cost of service?

Mr. ROBINSON. I believe that to be the true and correct statement of the facts: Either one of two things must follow. Either the owners of that road must receive the cost of their service, compensation for the service they render, or they must be, in justice, permitted to take off that road and discontinue the service. Either one of the two.

Senator MCLEAN. In a word, Mr. Robinson, why is it that this road has not been able to earn more than expenses?

Mr. ROBINSON. The rates fixed by governmental authority and the divisions that have been fixed by its connecting lines were such as to keep it from getting anything out of business it was able to handle. It has not had an adequate amount of the divisions that are available.

Senator MCLEAN. As fixed by other roads in that territory, you have not had an adequate amount of the divisions?

Mr. ROBINSON. In that group, in that territory, that is true. It has not had an adequate amount of the divisions that are available.

The CHAIRMAN. What is its connection?

Mr. ROBINSON. It is now the Southern Railway. It was the Cincinnati, New Orleans & Texas Pacific.

The CHAIRMAN. So this line connects with the Southern Railway?

Mr. ROBINSON. Yes; connects with the Southern Railway now. The Southern Railway has a line running from Cincinnati to Chattanooga.

Senator STANLEY. It is a part of the Southern Railway now?

Mr. ROBINSON. Yes.

Senator STANLEY. It used to be a tap line of the Queen & Crescent?

RIGHTS OF INTERMEDIATE STATES.

Mr. ROBINSON. The great majority of the forest products produced on that road are moved north through the State of Kentucky, on a trunk road that in ordinary times is a large earner. It is inconceivable that Kentucky can claim that rates should be fixed in that State so as to give it the advantage of the large earnings of that trunk road on traffic which was produced and started to the market from Tennessee and other States.

Nor can Ohio or any other State through which such traffic passes claim the benefit of the traffic so produced.

In view of the fact, as stated above, that about 85 per cent of the traffic of the country is interstate and only about 15 per cent is intrastate, it is without doubt a violent assumption to claim that the earnings of roads in a given State are to be credited to that State.

CLOTHING FOR THE NATION.

To give you another illustration: My vice president and general counsel, Mr. Cain, constructed the Gulf, Texas & Western, a 100-mile road running west of Fort Worth, Tex., and penetrating a large undeveloped section of that State. There were no developments in that territory when he began construction. Since that time a great deal of the territory then fallow has been opened and the territory now produces cotton, grain, cattle, and other necessary products.

Mr. Cain has recently investigated the final disposition of the cotton produced on his line. He finds that most of it moves to New England. A carload of cotton leaves his road after having been moved less than 100 miles and passes to one of the four trunk roads with which his road connects en route to St. Louis or Chicago. It then passes over one of the trunk roads to the New England territory, thence to the cotton mill, where the cost of producing the cotton and the necessary transportation is paid by the mill owner.

After being manufactured into cloth, it starts back over the New England line, some of it going over the trunk roads to the Pacific coast, some of it moving back to Texas, and some of it going to Florida, in which regions it is consumed. The consumer pays not only for the cotton but all of the transporta-

tion costs from the time it left the depot of Mr. Cain's road until it reached the consumer.

It must be conceded that all of the roads that participated in the movement of that cotton and cloth are a part of the transportation system of the country. It must be conceded that the consumer is directly interested in the road on which that cotton was produced, and it can not be successfully claimed that any road in any one of the States through which it passes is to have special credit for that business or the revenue which was derived from such traffic.

The CHAIRMAN. I think we will have to adjourn until Monday morning, and you may complete your statement then.

Mr. ROBINSON. I believe I can complete my statement in a half hour.

(Whereupon, at 1 o'clock p. m., the committee adjourned until Monday, November 28, at 10 o'clock a. m.)

MODIFICATION OF TRANSPORTATION ACT, 1920.

MONDAY, NOVEMBER 28, 1921.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 o'clock a. m. in the committee room in the Capitol, Senator Albert B. Cummins (chairman) presiding.

The CHAIRMAN. The committee will be in order, and we will proceed with the hearing on S. 1150 and S. 2510.

Mr. Robinson, you may proceed.

STATEMENT OF MR. BIRD M. ROBINSON, PRESIDENT OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION—Resumed.

STATE ROADS ARE UNITS OF NATIONAL SYSTEM.

Mr. ROBINSON. Mr. Chairman and gentlemen of the committee, at the time of your adjournment on Wednesday, the 23d instant, I was discussing the statement made by Mr. Benton, shown on page 188 of the printed record of your hearing, in which he said that under the commission's rulings, by reason of the group plan prescribed under section 15-a, "the shippers in one State were compelled to pay more than is necessary to yield a fair return on roads in that State to make up a deficit in desired earnings on other roads in other States." I had stated that assertion of Mr. Benton's was fallacious and unsound; he ignored the fundamental principle that our transportation system is of national scope and that every unit which renders a real public service is necessary to make up the whole.

I made the statement that I could enumerate thousands upon thousands of instances to demonstrate that the interest of the people of the Nation at large is the real paramount consideration, and that the narrow provincial interest of the State or local community is small in comparison. I gave two illustrations—first, the Tennessee Railway, a small road in Tennessee, and, second, the Gulf, Texas & Western Railway, located in Texas. The facts stated show clearly, as I believe, that the citizens in all of the States are directly interested in the traffic originated on and handled by said two roads. In the instance of the Tennessee Railway the principal traffic is forest products, which go to all sections of the United States as well as to all parts of the world; and the second important item is bituminous coal, which is distributed to points ranging from Chicago on the north to the Gulf of Mexico on the south; hence the public in all of said States have a real interest in the continued existence of that road. In the case of the Gulf, Texas & Western Railway, I had described the movement and probable final distribution of the cotton produced by the farmers in the region immediately served, showing that the citizens of all of the other States are interested in the functioning of that carrier. I had not mentioned, but do now call attention to the fact that the territory served by the Gulf, Texas & Western also produces wheat, cattle, and other necessary agricultural products in substantial quantities, the consumption of which is widely distributed throughout the country.

HAVE NEVER PROFITED.

Both of the two roads mentioned have in the past been permitted to earn little, if anything, in excess of their operating expenses, and for considerable periods in their history they have not been permitted to earn the full amount of their mere "out-of-pocket" expenses. In neither instance have these roads been

able to earn and pay any return on the money invested in their construction. In other words, they have been rendering efficient service to the public substantially below cost, and the owners of said properties have sustained the loss, but that condition can not continue indefinitely.

CONDITIONS NOT EXCEPTIONAL.

These properties are not exceptional. They are fair examples of a very large per cent of the 800 short lines——

Senator LA FOLLETTE (interposing). What are those roads? Name them again.

Mr. ROBINSON. The Tennessee Railway, and the Gulf, Texas & Western Railway.

The CHAIRMAN. Are those class I or class II roads?

Mr. ROBINSON. Class II roads both of them.

Senator, I described both of those roads in my previous testimony, and I am merely referring to them again. Repeating the statement I have just made, These properties are not exceptional. They are fair examples of a very large per cent of the 800 short lines, which produce a very substantial percentage of the total volume of the traffic of the country, practically all of which is delivered to the trunk roads and by them moved to destination, thus creating that density of traffic which enables that kind of roads to handle traffic at a very low cost.

The CHAIRMAN. What is the mileage of your so-called short lines?

Mr. ROBINSON. The total?

The CHAIRMAN. The total.

Mr. ROBINSON. It is estimated it is from 30,000 to 35,000 miles. It is rather indefinite just what constitutes a short-line road, so it is difficult to give a specific answer to your question. But it is from 30,000 to 35,000 miles.

Senator LA FOLLETTE. That is, in the aggregate?

Mr. ROBINSON. Yes; the 800 roads.

Senator LA FOLLETTE. Eight hundred of them?

Mr. ROBINSON. Yes; and when I speak of 800 it may not be entirely accurate; it may be a few more or a few less.

Senator LA FOLLETTE. I understand.

EVEN STRONGEST ROADS ARE DEPENDENT ON THROUGH TRAFFIC.

Mr. ROBINSON. We have no accurate record of the percentage of traffic originated by the short and weak roads, nor have we been able to prepare any record which will show the amount of traffic originated by the trunk roads, but it is a fact that few if any of the trunk roads originate a sufficient volume of their own to enable them to continue in business.

The Traffic World of July 9, 1921, makes the following statement:

"Class I roads usually are regarded as representing at least 90 per cent of the transportation business of the country. It is certain they have by far the greater portion of the revenue. Yet in the first quarter of this year they carried only 217,967,619 tons of revenue freight as originators of the traffic. They receive the rest of the total of 410,818,363 tons from their connections" (only a little more than half).

SHORT LINES ARE ORIGINATORS.

The short and weak lines originate or deliver a substantial amount of the through traffic handled by the class I roads, but they receive in return only a small percentage of through traffic from class I trunk roads. In fact, under practices and conditions in effect prior to the enactment of the transportation act, the short and weak roads were the only ones that were expected to, or required to, live upon the traffic which they originated, while the trunk roads were freely accorded all of the benefits of the through traffic as well as the revenue from the traffic which they originated. It was that condition in many cases which made the so-called strong road.

TRUNK ROAD SYSTEMS MUST HAVE THROUGH FREIGHT.

That fact can be successfully demonstrated by even a cursory examination of the business of most of our strongest and most efficient trunk road systems. For example, take the Union Pacific. During the early years following the con-

struction of that road both the local and through traffic was inadequate to meet its cost of service and it was forced into bankruptcy and liquidated. Since that time both the local and through traffic have increased greatly, but if its traffic was limited to that which it originates it would quickly become a weak road and would within a comparatively short period again reach bankruptcy. The through traffic handled by that system is originated on other lines and it is that traffic which gives that company its great strength and enables it to handle business at a low cost. If any considerable portion of that through traffic should be diverted to other lines, a thing that can easily be done by connecting lines, that road would, as a result, lose its premier position and gradually but certainly decrease in strength.

The interdependence of the various units of our transportation system can be illustrated by a similar comparison with the New York Central, the Pennsylvania, Erie, or the Baltimore & Ohio, and any other of the leading strong systems of the country. For example, if connecting lines or shippers, who have the right to route their freight, should for some reason determine to deliver their through business to the New York Central, the Erie, and the Baltimore & Ohio, it would soon reduce the Pennsylvania from its present strong and efficient position and cause it to become one of the weak properties of the country.

EQUAL RIGHTS OF STATES.

It is self-evident that the largest volume or densest traffic of the country State, including the short and weak roads, and moving to and through other States, is of equally vital importance to the citizens of all of the States and to all the units of the transportation system.

It is self-evident that the largest volume or most dense traffic of the country is in the districts surrounding New York and Jersey City. That density of traffic has the effect of decreasing the cost of producing the transportation, but it is a violent assumption to say that the citizens of Greater New York or the citizens of the State of New York and the State of New Jersey are to be credited with the benefits of that dense traffic, hence should receive extremely low or subnormal rates. It is true that the consumers of that district pay the transportation charges on such part of the traffic as they consume, but in so doing they must also necessarily pay the cost of the service rendered them by the road which originated the traffic or performed an intermediate haul. It can not be fairly stated that citizens, when paying the cost of the transportation services rendered them in their local city or State, are being compelled "to pay more than is necessary to yield a fair return on those roads to make up a deficit in desired earnings on other roads in other States."

FEED ENOUGH TO NOURISH ALL.

In summarizing my statement with reference to the group plan of making rates authorized in section 15-a, would say that I believe that that plan is the only one under which the Interstate Commerce Commission can, and will, meet the demands of the present situation confronting the railroads.

It is based upon the fundamental principle that all of the roads rendering a real public service are a part of the transportation system, and that the roads shall receive just compensation for the services they render. That section provides a measure by which the Commission can divide the total revenue between the various participating roads in such a way as to give to each that portion which is due them, and thus insure justice to and a continuation of the short and weak roads, which serve a real public purpose.

ALLEGED WORTHLESS ROADS.

I want to discuss, seriatim, the character or kinds of roads mentioned in the preamble and referred to in the resolution of the National Association of Railway and Utilities Commissioners, which I have heretofore read into the record.

The first class mentioned as objectionable is called "the worthless roads of the country." That term is a very general one and does not carry with it any indication of the kind of roads so questioned, but it is a term frequently though loosely used by many of the public when referring to some road or roads that have not been a financial success. More frequently than otherwise, however, it is not only not justified by the facts but is a meaningless and worthless statement.

IS FINANCIAL SUCCESS THE YARDSTICK?

I am more familiar with the railroads of the country than the average person. In fact, my knowledge is rather extended, and I know of but few roads that could properly be called worthless. Permit me to call your attention to a few roads which have often been so characterized by the public:

THE HENRY FORD ROAD.

If earning power alone be the prime test, the case of the Detroit, Toledo & Ironton is an interesting one to contemplate. That road consists of about 450 miles, running from Detroit and Toledo on the north to Ironton, Ohio, on the south. While its termini are located nearly due north and south, the road runs in something of a semicircle, and misses most of the important manufacturing and business centers in that section. It crosses all of the trunk roads running from the Atlantic coast to Chicago and St. Louis and crosses most of the north and south lines in its territory.

That road consists of several former short railroads. The original road is said to have been constructed in 1874, and its history shows a continuous line of bankruptcies, receiverships, and reorganizations. For many years it has been often pronounced a "road that should never have been built." It has been almost universally branded as a "worthless" railroad. Most of the time during its existence it has suffered substantial operating deficits, and during only a small part of its existence has it earned sufficient to pay operating expenses.

That road originated a substantial amount of traffic, but, like other roads, it could not exist on that alone. During its existence other roads in its territory absorbed many of the short or intermediate class of roads and thereby acquired control of the greater part of the available through traffic. These consolidated carriers did not permit the Detroit, Toledo & Ironton Railroad to have any substantial part of the through traffic which they controlled, hence the volume of business which it handled was insufficient to maintain it.

Yet with all its unsuccess this road has always had a decided potential value in the very fact which was its financial weakness, in that it does avoid the congested industrial centers—for one of the gravest of the physical problems which confronts the railroads as a whole is that of inadequate terminal facilities at originating, terminal, or intermediate business and manufacturing centers—so it is readily conceivable that in times of great activity in the growing and prosperous Detroit region an open outlet which avoids all the points of congestion may afford an immense relief during periods of threatened blockades.

The Detroit, Toledo & Ironton Railroad Co. was organized in 1914 and took over the property from a receiver. The market value of its securities declined from the time of the organization until some time in August, 1920, when Mr. Henry Ford acquired all or practically all its outstanding securities. The Railway Age states that Mr. Ford did not become president of the company until the 4th of March, 1921, and that no change in policy or operation of the road took place until that time.

Senator LA FOLLETTE. Do you know the history of that road, Mr. Robinson?

Mr. ROBINSON. I am giving you most of the history that I know, Senator.

Senator LA FOLLETTE. Do you know that it was built in 1874?

Mr. ROBINSON. The record shows that. I am repeating all these statements from the record, which I have access to.

Senator LA FOLLETTE. What was it capitalized at?

Mr. ROBINSON. I can not from memory give you any facts with reference to its capitalization either at the beginning or intermediate or at the present time.

The CHAIRMAN. It was not built as a complete road as it is at the present time?

Mr. ROBINSON. I stated that it was built up from a number of short roads.

Senator LA FOLLETTE. You do not know the capitalization or financial history of the several roads which comprise the Detroit, Toledo & Ironton Railroad?

Mr. ROBINSON. I do not. So far as the thought I am trying to advance here, it has no direct bearing on the thought I am trying to advance. But I do not have any knowledge of the organization or capitalization of that road at any time.

The records show that the Detroit, Toledo & Ironton in February, 1921, incurred an operating deficit of $104,923, and that in April, two months later,

it produced a net operating revenue of $301,675. It is self-evident that no material change in the physical condition of the property could take place within the said two months, hence the remarkable change in results was due to other conditions. The record shows:

"During the four months September to December, 1920, inclusive, after the present railway freight rates were fixed, the Detroit, Toledo & Ironton handled an average of 49,246,000 ton-miles of revenue freight per month and had freight earnings averaging $493,800 a month. In the months of April, May, and June, 1921, the road handled an average freight business of 37,093,000 ton-miles a month and earned from it an average of $694,203 a month. In other words, its average freight tonnage in these three months was almost 25 per cent less than in that last four months of 1920, while its average monthly freight earnings were over 40 per cent greater."

The record also shows that the Detroit, Toledo & Ironton received approximately 1 cent per ton-mile during the last four months of 1920, and that for the month of April, 1921, it received 2.13 cents, in May 1.76 cents, and in June 1.78 cents per ton-mile. For the four months mentioned the receipts averaged 1.88 cents per ton-mile. During the same period the average revenue per ton-mile for all class I roads increased only from 1.1 cents to 1.33 cents per ton-mile.

This so-called "worthless road," or "road that ought never have been built," was suddenly removed from that unenviable status to a road that became not only self-sustaining but was widely advertised throughout the land as having been transformed into a model, successful railroad. There was no change in the termini of the road; there was no material change in the physical condition of the property; it did not make any extensions or reach any new markets; and, so far as is apparent, nothing was done with the property itself which could produce the change that took place. The facts are that Mr. Ford was able to divert business being handled by other railroads to the D., T. & I and thus completely change its situation and make it a road that could be operated at a profit.

Senator POINDEXTER. How was he able to do that?

Mr. ROBINSON. Senator, I am going to touch on that.

Senator POINDEXTER. Very well.

Mr. ROBINSON. Mr. Ford, as is well known, has very large manufacturing plants at Detroit and other points; he controls the routing of all raw material shipped to his plants and the routing of the finished products sent therefrom to all parts of the world. He was able to, and did, cause practically all, if not all, of such traffic to be routed over the D., T. & I. The great majority of such traffic was high class and paid a substantially higher rate than the bulk of the traffic, such as coal and other commodities, which had previously constituted its principal traffic.

But the diverting of large volumes of traffic from roads that had theretofore handled it is apparently not all, for it is charged that the Ford interests demanded and obtained a very large increase of the divisions of joint rates from roads with which the D., T. & I. now exchanges business.

I do not intimate that the road was not entitled to such increase in divisions, or that there is anything illegitimate in Mr. Ford's having taken his freight business away from the other railroads and given it to the D., T. & I. as an "elixir of life," but it illustrates how a carrier which was a business invalid from birth has been made strong and prosperous by the sustenance derived from through traffic routed to the most distant parts of the country.

OTHER CASES.

I have heretofore in my testimony described the Tennessee Railway and its failure to earn sufficient funds to make it a financial success, and I described the substantial public service which it has rendered and which it will render in the future. That road has been unjustly characterized by many as a "worthless" road or a "road that ought never have been built."

Senator POINDEXTER. Let me get the location of that road. I do not just recall it.

Mr. ROBINSON. It is a road which I built in Tennessee, due south of Cincinnati, and which I described minutely in the first part of my testimony.

To repeat the last sentence: That road has been unjustly characterized by many as a "worthless" road or a "road that ought never have been built."

I have heretofore described the Gulf, Texas & Western Railway, and stated that it had been unable to earn sufficient to make it a financial success. I also

described the services it is rendering and called attention to the territory which it serves, and I stated that that has been termed as a "worthless" road or a "road that ought never to have been built."

UNFAIR TO CHARACTERIZE AS "WORTHLESS."

Statements of that character are wholly unjustified as to said roads, and I could describe a very large per cent of the 800 short lines of the country and show that very few, if any, failed to render a real public service, and that it is unfair to characterize them as worthless, and it is detrimental to the public welfare to exclude them from being considered and properly recognized in any constructive plan for rehabilitating the railroads and permitting them to have the constitutional right of receiving just compensation for the value of their service. They can not, however, continue to serve the public without being paid for the services they render; that result can not only be successfully accomplished through the group plan of making rates, but it can be done under that plan in a way that will be fair to the public.

If there are any railroads in existence that are truly worthless, they should be eliminated from the situation, and proper authority to accomplish this is contained in the transportation act, and I will discuss hereafter that subject.

ILL-CONSIDERED VENTURES.

The preamble which I have read also names what is called "ill-considered ventures," but the phrase is so ambiguous that it can not very successfully be weighed. One can not know what that association had in mind when presenting it as a basis for the repeal of section 15a of the interstate commerce act. It is possible that some small roads have been constructed without due consideration, but if so, the amount involved is practically negligible.

The commission in the exercise of the power given it in the rule of divisions will hardly give any such road substantial encouragement.

If there be any such road, the remedy is to have it abandoned and scrapped.

DUPLICATED LINES.

The third class of roads mentioned in the preamble is "duplicated lines." That term is a most general one, and in view of all the facts it should be analyzed before being given any imagined weight.

It is true that there has been some duplication of lines in this country. Among the notable instances I may mention the Pacific coast extension of the Chicago, Milwaukee & St. Paul, the Western Pacific, and the Nickel Plate. These roads did materially duplicate some existing facilities, but they developed and served extensive new territories that were without adequate transportation facilities; and all of them now render a great public service. It is inconceivable that lines of that character can be abandoned. If they can not, they must be sustained.

MOTOR-TRUCK DUPLICATION.

There is at this time an extensive duplication of service that is placing a much greater burden upon the public than the inconsequential duplication of railroad lines. I refer to the motor-truck lines. All the States of the Union are now building fine highways and the Government is contributing liberally thereto. Motor trucks are rapidly invading the transportation field and duplicating the service rendered by the railroads, under conditions that are most unfair and unjust, and are imposing a substantial burden upon the public. Trucks of that character in most of the States are permitted to compete as common carriers with existing railroads without paying anything for the road building or the upkeep, and they are rapidly destroying the roads. In most of the States they are wholly unregulated, being permitted to operate without schedule and without any regulation as to their charges.

Senator POINDEXTER. There isn't any Federal regulation whatever as to that industry—that is, as to the motor-truck lines?

Mr. ROBINSON. There is not, and we are of the opinion that there can not be any Federal regulation. We have investigated that matter and find that only 4 per cent of their business is interstate; something more than 90 per cent of

their business is probably intrastate, and therefore it would be very difficult for the Government to meet that situation.

But in advancing this thought at this time I was attempting to call the attention of the National Association of Railway and Utilities Commissioners to a real duplication of service, and I am going to attempt to show that in some of the States they have control of this duplication of service and that they are not in any way adequately or successfully limiting it. That is the thought I had.

The railroads must not only build and maintain their own tracks but are taxed heavily to create and maintain the highways used by the trucks; operate upon schedules, and are governed rigidly as to the charges they may make. Under those conditions the motor trucks underbid the railroads on the cream of the local business, though they are under no obligation to operate during bad weather. In this way they not only duplicate existing lines and service, but by decreasing the volume of traffic of the railroads they increase the cost of the service of the rail carriers.

Some States have given their railroad commissions authority to regulate motor trucks, but in most of such States the commissions utterly fail to prevent the duplication of the service and fail to require them to compete upon a fair basis.

If there be any duplicated railroads that do not render a real public purpose, they should be abandoned, and the commission has power to accomplish that result.

The CHAIRMAN. Let me ask you a question there: In speaking of the motor-truck business and its extent, do you include the motor trucks that are not common carriers; that do business for one particular enterprise or concern?

Mr. ROBINSON. I do not.

The CHAIRMAN. Or do you only include those that do business as common carriers?

Mr. ROBINSON. I contemplate those doing business as common carriers. I doubt the ability of the Government to prevent a manufacturing enterprise from running its own motor trucks and rendering service. I refer exclusively, in my statement, to those doing business as common carriers.

The CHAIRMAN. Where did you get your statistics on that point? I am anxious to know where you get the statistics?

Mr. ROBINSON. There are no statistics that are reliable, but we have had to grope around at this place and that place to find what proportion of the business crosses State lines. And these figures I gave here, gentlemen, can not be absolutely established.

The CHAIRMAN. A great many of the motor-truck lines that do cross State boundaries are engaged in moving the products of a particular concern, and are not common carriers.

Mr. ROBINSON. I attempted to answer you a moment ago, Senator, to say that those I contemplate are those that are rendering the service as a common carrier, and not those that belong to a given enterprise.

The CHAIRMAN. I do not know that any reliable statistics have been gathered on that point. I have been much interested in that subject and have tried to get the figures, and I could not find any that are to be depended upon.

Mr. ROBINSON. I am not sure that the figures that I have given you as to the percentage of interstate business are at all reliable. Because there is nothing that we could look to that would make it absolutely certain that our figures were reliable. But we do know, from the investigations we have made, that the interstate business handled by these common carrier motor trucks is comparatively small. The great bulk of it is intrastate business.

Senator POINDEXTER. Complaint is beginning to arise, at a few points that I know of, of State oppression, or State discrimination between certain rivals of common carriers of interstate business, and inquiry is being made as to why the Federal Government does not protect them. I never discovered that the Federal Government had in any way ever endeavored to do anything at all about it. That is the reason I asked you the question.

Mr. ROBINSON. So far as I know, the Federal Government has not. I may say that a Member of the House asked us to prepare a bill which he might introduce in the House to place motor trucks engaged as common carriers under the control of the Interstate Commerce Commission. As a result of that request, we made some investigation and concluded that it would not be feasible to amend the interstate commerce act in a way to place that class of carriers

under the control of the Interstate Commerce Commision, as it would probably necessitate an entirely new bill. And during that investigation we reached the conclusion that the percentage of interstate business handled by that class of carriers was so small that it would probably not justify Congress at this time in dealing with the matter. And, therefore, we did nothing.

SPECULATIVE ENTERPRISES.

The fourth class of roads mentioned in the preamble are "speculative" enterprises. That term, like the others, is exceedingly vague and general. A road, whether constructed as a speculative enterprise or otherwise, must stand upon its merits. If it renders a real public service it is entitled to continue to exist and to receive just compensation for the service it renders. If it does not render a real public service, it should be abandoned, and the commission has power under the transportation act to accomplish that result. A road built originally as a speculative enterprise may, in fact, become one of great importance and may serve the public in the highest degree. In any event, the question is one to be tested primarily by the public necessity and convenience.

ROADS THAT HAVE OUTLIVED THEIR USEFULNESS.

The fifth class of roads referred to in the preamble are "roads that have served their useful purpose and outlived the industries which once justified their construction."

There are a few small roads of that character, but the whole value thereof is exceedingly small; and where it is clear that they no longer render a real public service they should be abandoned. The law gives the commission power to accomplish such a solution.

VALUE OF THE FOREGOING CLASSES OF ROADS TO BE CONSIDERED BY THE COMMISSION.

I have attempted to analyze in a limited way the reference to the class of roads mentioned in the preamble referred to, and I do not hesitate to express the opinion that while there is a mite of truth as to each of the classes mentioned, yet the aggregate value of all of the roads that can be properly placed within the confines of the classes mentioned is exceedingly small. In fact, so small as to be negligible when considering the great problem of the transportation system as a whole.

The preamble and resolution referred to are based upon the statement that "good roads are given the right to earn upon their own value and also upon the value contributed to such worthless roads which can not earn because they perform no useful purpose in the actual movement of traffic to enable them to earn." That is quoted from Mr. Benton's testimony. Obviously that conclusion is not justified by the facts.

UNDER-PLUS RESULTS.

It is true that prior to the time the commission shall decide to exclude any road it does take its value into consideration when fixing the level of rates. Past expérience would seem to justify the conclusion that no harm to, or undue burden will thereby be placed upon, the public because of the inclusion of the limited value of so-called "worthless roads," for the reason that the rate level established on the value of all roads has produced less than 50 per cent of the amount which Congress fixed as a fair return on the value of their property held and used for public service. Hence, if the limited value of all of the classes of roads objected to was included, it was not detrimental to the public. In the event that the earnings of the roads in a given group, or as a whole, should earn more than the fair return fixed, the commission will, without doubt, promptly reduce the rates.

If we apply the objection urged in the preamble and resolution to a road within any of the classes mentioned it will at once be apparent that the road in question must stand upon its own merits. If it orignates traffic that moves over connecting lines its existence will be justified to a like extent. The extent of the service can easily be ascertained; hence, there is no probability that it will become an incubus upon the transportation system if it does not render a real public service.

The duty of the commission is to protect the public and do justice to the carriers. It should not, and I believe it will not, include the value of any worthless road for rate-making purposes; nor will it give divisions of joint rates to roads that do not render a public service. In view of all of the facts, I assert that the group plan of making rates, prescribed by section 15a, is not uneconomical and unsound, and does not place an unjust burden upon the business of the Nation. On the contrary, I am firmly convinced, and in that I am supported by the best judgment of practically all of the officers of the 800 short-line roads of the country, that the group plan of making rates prescribed by section 15a is sound and is the only plan under which rates can be made in this country, and that the principle upon which it is based is the only one upon which the question of the weak and strong roads can be solved.

DIVISIONS.

In this connection I desire to read the following paragraph from the testimony of Mr. Benton before this committee. I read from page 226 of the printed hearing:

"Now, it has been suggested that the unjust and unreasonable amounts that will be received by some carriers under the group plan of rate making may be diverted to the weaker lines through divisions. I point out that the right to make divisions does not depend upon 15a; that just divisions can be established and rates can be fixed upon the basis of what just divisions ought to be without 15a."

THE YARDSTICK.

I can not agree fully to the proposition Mr. Benton makes "that the right to make divisions does not depend upon 15a." It is true that the right to make divisions is not conferred by 15a, but 15a has a substantial bearing on that question. The effect of the repeal of 15a will be to take away the measure which is now provided, and, when the commission comes to apply the rule of divisions in paragraph 6 of section 15, they will have no measure by which to fix the comparative fair return on railway property held for and used in the service of transportation.

Speaking for the American Short Line Railroad Association, when the transportation act was being considered by Congress, I earnestly advocated the incorporation of a mandatory rule of rate making, which was done in section 15a. We did not advocate fixing the rate at 5½ per cent. We believed that it would be best for all concerned to authorize the commission to fix the amount from time to time. Notwithstanding that fact, we are now strongly of the opinion that it would be seriously detrimental to repeal that section. It is true that it has been demonstrated that the carriers as grouped, or as a whole, will not earn or can not earn, at the present time, the authorized 5½ per cent; and it is true that that provision will expire on the 1st of March next.

If that section remains the law, the commission has a definite measure by which to make divisions. If repealed, the commission will find it much more difficult to make just and equitable divisions, and may, therefore, fail to accomplish that result. If they do fail, it will result in the bankruptcy of many of the smaller or weaker lines.

OLD RULE NOT SATISFACTORY.

In the past the trunk roads, as a rule, have arbitrarily made the division of joint rates, and in most cases have not accorded to the short lines or branch lines a fair proportion of the revenue earned by them through joint service. Hence, the short lines had to struggle for an existence and have one by one fallen by the wayside because they were not paid an adequate amount for their services.

DO NOT DISCOURAGE INVESTORS.

The psychological effect of such a repeal on the minds of the Interstate Commerce Commission and the public can not help but be adverse, and it will, without doubt, be used by that class of citizens who constantly advocate lower rates, regardless of the effect upon the roads, when conducting their campaign to accomplish their selfish purposes.

HOPE FOR THE FUTURE.

That condition can, and I confidently believe will, be remedied in the future. It is true, that the Interstate Commerce Commission has not, as yet, made divisions of joint rates as required by paragraph 6 of section 15 of the interstate commerce act, but it now has that matter under consideration, and I am confident that it will establish a rule of divisions which can be utilized by the short lines in their negotiations with their connecting lines; and, in the event the interested parties do not agree thereafter, I am confident the commission will promptly act in individual cases.

THE NEW ENGLAND CASE.

It is true that the commission did not act in the New England case, but I do not believe that Mr. Benton, in his Bulletin No. 57, 1921, which is copied on pages 226, 227, 228, and 229 of your printed hearing, has fully understood or correctly interpreted the decision of the commission in that case. I strongly indorse the dissenting opinions of the commissioners which he incorporates, but I do not believe that the majority of the commission went farther in their finding than to decline to act on the facts before them, but decided to send the matter back to the interested roads with instructions, either to agree among themselves or to present the matter again with necessary additional information. I am now advised that the commission has reopened that case and will again give it consideration.

PROPER INTERPRETATION.

That rule of divisions, when properly interpreted and applied, will result in giving to each railroad its fair, just, and equitable division of the joint rates where it performs a part of a service; and it will then give each unit in the transportation system, as nearly as may be, the cost of its service. It will enable each of the carriers that perform any substantial public service to receive revenues sufficient to maintain it and keep it in operation for the benefit of the public. Nothing should be done that will to any extent repeal or impair that part of the law.

ABANDONMENT OF ROADS.

Mr. Benton submitted in behalf of his association an amendment to paragraph 20 of section 1 of the interstate commerce act, which would have the effect of nullifying the authority the law now confers upon the Interstate Commerce Commission to issue certificates of convenience and necessity authorizing the abandonment of a railroad. The proposed amendment would require the carrier, in interest, to obtain permission of the respective State authorities before the commission's certificate would be effective.

If, under such circumstances, the respective States should prevent the abandonment of a road thus found to be worthless or of no public service, it would thereby force the Interstate Commerce Commission or the State commission to give it such rates and divisions as will enable the owners to operate it, for the owners can not be compelled to operate at a continuous loss.

If the present law is permitted to continue, the commission can, and it is its duty to, issue a certificate permitting the abandonment of a property and thereby remove from it the right to make any legal or equitable claim to have its value included for rate-making purposes or to participate in the revenue derived from transportation.

The National Association of Railway and Utility Commissioners, in their preamble and resolution which I have read, condemn the inclusion of that kind of a road as a basis for making rates, and yet their proposed amendment to paragraph 20 of section 1 would force that very condition in several of the States.

For example, I understand that North Carolina has a law definitely prohibiting the abandonment and removal of a railroad. I am also advised and believe that the laws of the State of Texas specifically prohibit the abandonment and removal of a railroad. The officials of that State have been untiring in their efforts to enforce that provision of their law.

WASTING THE CORPUS.

The Marshall & East Texas Railroad, a line of approximately 100 miles in length, was constructed some years ago. It proved to be a financial failure and a receiver was appointed. The receiver issued all of the receiver's certificates that he could sell and consumed the funds in the operation of the road. The property was sold and purchased by the owners of the receiver's certificates. It again proved to be a financial failure and a second receiver was appointed. That receiver succeeded in selling a limited amount of receiver's certificates and consumed the proceeds thereof in the operation of the road, but finally reached the limit of his ability to operate and thereupon attempted to abandon the property and remove the rails. The State of Texas contested in the courts that effort, and that matter, as I understand it, is still pending. No trains have been operated upon the road for five or six years. Ties and structures have rotted and it would be impossible to operate a train. Notwithstanding that fact, the owners of the property are helpless and I respectfully submit that such conditions affecting a part of the transportation system of the country should not be permitted; and that the investors or owners of roads should not be crucified.

CASE OF THE LINVILLE RIVER RAILWAY.

I will give you another illustration: Some individuals constructed the Linville River Railroad in western North Carolina, due east of Johnson City, Tenn. There is a very large tract of timber in that section of the country, and those gentlemen built 32 miles of road, costing them approximately $20,000 per mile, for the purpose of removing that timber. They estimated that there was sufficient traffic there to engage that road for a period of 10 years. Since that time, or immediately thereafter, the transportation act was passed. which limited the earnings of a railroad to 5½ per cent, plus the allowances that might be made, and requiring a recapture of all the earnings of the road in excess of the earnings provided in that act.

The difficulties which the owners of that road now find themselves in, are that they may not earn in excess of 6 per cent without those earnings being subject to recapture; and at the end of the 10 years, when they have removed the timber, for the removal of which the road was built, there is nothing to maintain that road, and under the laws of North Carolina, they can not remove the rails. Had the provision of recapture not been incorporated in the transportation act, they might have made a sufficient profit on that road during the next 10 years so that it would have paid them to have had it, without attempting to remove the rails after the timber was removed. But as it is, they can only be allowed to make 6 per cent on the investment for 10 years, and then lose their investment.

OUR POSITION WHEN THE ESCH-CUMMINS LAW WAS FORMULATED.

I have not located the record of our presentation of the subject to your committee, hence I take the liberty of quoting from the record of testimony presented by our Mr. Ben. B. Cain to the House committee, as follows:

"The next amendment to which I will call your attention is after the word 'abandonment,' line 19, page 9, of the committee print. I think the pending bill does give authority for the commission to permit a line that ought not to have been constructed to be abandoned, but it is our thought that the bill should go further and make it mandatory upon the commission to issue the order where it is impossible to operate a road so as to make it earn an operating income, therefore, we suggest this amendment after the word 'abandonment':

"'*Provided*, That in all cases where it appears that a railroad with just and reasonable rates, fares, charges, routes and divisions, and efficient management can not, with reasonable certainty, be made to earn an operating income, the commission shall, on application and proper showing, grant to such railroad the authority to discontinue operations and to dismantle and dispose of its property.'

"As I said a while ago, there are some roads—they are few, but there are some roads—that really perform no substantial public service. There are roads that in my judgment never can be made to earn their operating expenses.

"Mr. SIMS. Is there no authority now in the law that a road may be dismantled?"

"Mr. CAIN. There is not, Judge, and in my State, as Mr. Rayburn knows, and in others, there are legislative acts against the abandonment of roads. In other words, a road chartered has to be operated as long as you can find some fellow who will lend you enough money to operate it."

We then produced extended testimony for the purpose of showing that the three fundamental principles just stated were vitally necessary to insure a well-rounded and efficient national transportation system. We then showed that in addition to having adequate rates and a just division of joint rates it was necessary to give the commission authority to abandon properties that did not or could not render a real public service. We then thought, and now believe, that the commission should have authority to eliminate from the system any road that did not serve a real public service and for that purpose we inserted in the rule of divisions which we then proposed and which was subsequently adopted as a part of paragraph 6 of section 15 that the commission should, among other things, consider "the importance to the public of the transportation services of such carriers."

We then believed, and I now believe, that the commission can, in the exercise of its authority, eliminate any and all lines that do not sufficiently serve the public. We are strongly of the opinion that it would be unwise to take from or limit the authority the commission now has in that respect.

POSSIBLE ELIMINATIONS ARE NOT EXTENSIVE.

The combined value of the 800 short lines of the country with 35,000 miles is in the neighborhood of about $2,000,000,000; and if it is conceivable that they could all be wiped out of existence and leave the rural districts without any transportation facilities, it would reduce the total aggregate of all railroad property to an extent of but approximately 10 per cent. This illustrates the obvious fact that the total values which could possibly be involved in the limited number of instances where a railroad may be found to be really worthless from the standpoint of public convenience and necessity is so small as to be of no consequence in dealing with the railroad problem as a whole.

IMPORTANT TO INVESTORS.

However, it is, of course, a matter of serious gravity to those investors who have bought the stock and bonds of such an enterprise that the physical assets be not dissipated needlessly by prolonged delay in liquidation, and that they have an opportunity to realize as much as possible from the salvage value of the scrap.

FORCING WORTHLESS ROADS TO CONTINUE.

It seems decidedly inconsistent that the State commissioners should have adopted a preamble and resolution premised on the alleged existence of worthless railroads, and then seek an amendment to nullify the authority of the Interstate Commerce Commission to eliminate any such instances.

It is the consistent policy of this association to look at these matters from the broad standpoint of sound public policy, as we know full well that any other foundation is laid on sand. It is our view, therefore, that in every instance where it can be clearly determined that a road is really worthless it should be promptly and clearly eliminated from the situation, but, on the other hand, justice demands that if the owners of such a property are not to be permitted to abandon operation and salvage the scrap it must be included in the values upon which a proper rate level is to be fixed, and sustenance out of the general level of rates must be given.

For the reasons stated, we earnestly recommend that Congress decline to amend paragraph 20 of section I of the interstate commerce act.

FOUR PRINCIPLES ARE ESSENTIAL.

As a result of a long and intense study of the problem, I am firmly of the opinion that the transportation act contains all the principles necessary to finally solve our railroad problem. To meet the present situation, the following are the essential principles: First, the mandatory rule of rate making; second,

the rule of divisions; third, the authority for the Interstate Commerce Commission to permit the abandonment of a road not necessary for the service of the public; and fourth, the especially fundamental provision for the consolidation of the present large number of carriers into a few well-balanced competitive systems.

CONSOLIDATIONS INEVITABLE.

The eventual consolidation of all the roads into a limited number of competitive systems must be accomplished, and I am confident that it will be.

In the past the policy of the Government, insofar as it has been expressed by Congress and by most of the State Legislatures, has been opposed to consolidation of railroads, and much litigation has occurred, especially upon the part of some of the States, to prevent consolidations. Notwithstanding that public policy, many consolidations have been made.

In fact the great majority of our strong and efficient trunk roads are the beneficial result of many consolidations. For example, it is said that the Pennsylvania system now consists of what was formerly 212 different roads.

Senator POINDEXTER. There never has been any State or national policy against any such consolidation as that, has there? As I understand, that consolidation was similar to that of many other large systems like the Southern, in that it connected up a number of consecutive lines that were not competitors of each other. The policy of the Government has been against consolidation of competing lines, has it not been?

Mr. ROBINSON. That was the basis of the policy; yes, sir. But in many of these cases that I have knowledge of, like the Southern, it was accomplished notwithstanding the opposition to it. I am going to touch on that subject further on.

Senator POINDEXTER. Very well.

Mr. ROBINSON. For example, it is said that the Pennsylvania System now consists of what was formerly 212 different roads, and I am advised and believe that a very considerable number of the roads which now compose that system found it difficult to obtain revenue sufficient to sustain them as separate units. In fact, that many of them went through bankruptcy prior to being merged into the present system. As a result of the consolidation of these properties we have one of the strongest and most efficient railroad systems in the world. A like statement could be made with reference to most of our large successful transportation systems.

CONSOLIDATION WITH SAFETY.

I see from the printed records of your hearings (p. 71) Senator Stanley submitted the following question to Witness Jackson:

"Do you believe it is possible that those railroads which are normally so situated as to take care of themselves without any Government aid or guaranty or any other arrangement by which they could receive assistance outside of their own exclusive business; do you think that those roads which would normally have made a return of 6 per cent or over can take care of their weaker brothers—less fortunately located railroads—can take them into the lifeboat, so to speak, and not endanger the boat and sink them all?"

Without presuming to be officious, I take the liberty of submitting the following statement, with the hope that it may serve to some extent in giving information in answer to Senator Stanley's question:

TRANSPORTATION NOT A GOVERNMENT FUNCTION.

I firmly believe that transportation is not a proper or logical function of the Government of the United States, and that it should not engage in the transportation business, especially since we have had the recent experience whereby the Government did exercise that function at a very large cost and in a manner that caused great dissatisfaction and distress to the public.

NO SUBSIDY OR FISCAL GUARANTY.

I am also firmly convinced that the Government as such should not enter upon a policy of aiding or guaranteeing financial results to the carriers. On the contrary, I believe that the Government should, in the exercise of its con-

stitutional right to regulate commerce among the States, establish such rules and regulations as will permit the carriers to earn and receive an amount necessary to meet their reasonable and proper expenses, including other charges, and just compensation for the services rendered. If that policy is adopted and put into execution no aid or guaranty upon the part of the Government will be necessary.

I have heretofore stated at some length that the traffic originated by even the strong trunk roads would not enable most of them to operate and remain solvent; that they must have, in addition to their own traffic, a substantial amount that has been originated by other roads. I am confident that less than 25 per cent of the railroads of the country can earn as much as 6 per cent, which Senator Stanley suggests, on the basis of "their own exclusive business." Hence, I feel that it is a mistake to assume that any considerable portion of the roads can continue to function and prosper unless they receive "assistance outside of their own exclusive business." In other words, they must have the traffic originated on other lines or they can not accomplish the result stated.

Senator POINDEXTER. You might also add that they must have assistance for the traffic originated on their own lines; it works both ways.

Mr. ROBINSON. It does work both ways, Senator, and I thank you for the suggestion.

STRENGTH IN CONSOLIDATION.

I think that the consolidation of roads that have been made proves conclusively that the fortunately located railroads have been benefited by acquiring lines that were not as fortunately located or as prosperous; and that the result of such consolidations is the large and strong systems which we now have.

THE LOUISVILLE & NASHVILLE.

I am confident that Senator Stanley has an extended knowledge of the Louisville & Nashville system. I am advised, and believe, that the original Louisville & Nashville Railroad has been greatly benefited by the various lines which it has acquired and absorbed. The taking over of the various lines has not endangered the life or the usefulness of that original property, and the public has been very greatly benefited by the fact that a number of weak lines throughout that section of the south have been absorbed into a successful system.

THE SOUTHERN RAILWAY SYSTEM.

I am also confident that Senator Stanley has some knowledge of the Southern Railway system. It is rather difficult to know what part of that road was the original line. I understand it now consists of 72 or more former railroads, and I know that several of the principal original roads which now constitute that system were unable to operate successfully as separate and independent properties; that several of them went through bankruptcy more than one time; and that since they have been combined into the Southern system it has become a strong, successful, and efficient carrier—one that efficiently serves the public not only throughout the South but in all of the States of the Union.

A WESTERN EXAMPLE.

I am advised, and believe, that one of the most successful systems in the Middle West now consists of what was formerly a large number of independent roads, most of which failed to succeed as separately operated properties; but, notwithstanding that fact, that system is now one of the most successful in the United States.

About 40 per cent of the trackage owned by that system consists of branch lines. It is stated that the question of the value of the service of those branch lines to the main line was questioned by the stockholders, and, as a result of which, an investigation was made by a committee of experts. That committee reported that practically all of the branch lines brought their traffic to the main line charged with an operating loss, but that the traffic they contributed produced a substantial profit to the main line, and that if said branch lines were disposed of or separated from the main line the latter would become bankrupt.

PROPER CREDIT NOT GIVEN BRANCHES.

It is apparent from that statement that the main line officers were not giving their branch lines credit for a fair share of the joint revenue. The apparent loss on the branch lines and the so-called deficits of the branch lines were subsequently paid out of the main line treasury. I repeat this statement for the purpose of showing that the branch or weaker lines did not sink that system; on the contrary, that they aided in making it a prosperous property.

If time would permit, I could give detailed information about other consolidations that have been made, and show conclusively, as I believe, that the public at large and the transportation system as a whole has been benefited by the consolidation of various properties, including both weak and strong. I confidently believe that the final solution of the railroad problem in the United States is to consolidate all of the units of the transportation system into a few well-rounded competitive systems.

LET THE WATER FLOW DOWNHILL.

I have not concurred in the opinion that the Government has the right to compel consolidation, and I do not believe that that will be necessary. If the Interstate Commerce Commission fixes rates sufficient to pay for the transportation service rendered to the public, and exercises the authority given in the transportation act to make divisions of joint rates, so that each road will receive just compensation for the service it renders, the result will be, I believe, that the carriers will gradually, but certainly, be consolidated. The whole plan of consolidation can be rounded out, I think, without endangering the boat or sinking any of them.

THE LABOR BOARD.

In conclusion, Mr. Chairman and gentlemen, I wish to say that while we strongly endorse the principles of the transportation act, we realize that it is not perfect in its details. There is one feature that deserves consideration of Congress and ought to have it in due time and in a proper way. And I refer to sections 300 to 316, with reference to the Labor Board. I do not here criticize the Labor Board in any way. But it is not possible for it to successfully meet what Congress contemplated, situated and surrounded as it is. That body and the Interstate Commerce Commission ought, in some way, to be brought into close conjunction, and ought to work, in some way, together. And we are of the opinion that Congress ought in due time and as early as it can give that matter due consideration after having made a full study of all the facts surrounding it.

I thank you, Mr. Chairman and gentlemen.

The CHAIRMAN. Senator La Follette, have you any questions to ask Mr. Robinson?

Senator LA FOLLETTE. No, sir.

The CHAIRMAN. That will conclude the statement, then, of Mr. Robinson.

(Whereupon, at 11.20 o'clock a. m., the committee proceeded to the consideration of other business.)

LIBRARY OF CONGRESS
0 013 359 055 9